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No.

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In The

# Supreme Court of the United States

October Term, 1992

WILLIAM POLLEN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a criminal defendant's right under the Fifth Amendment to the United States Constitution, not to be placed in jeopardy twice for the same offense, was violated by imposition of consecutive sentences in a tax evasion case, where counts of an indictment charged separate attempts to evade identical taxes rather than each tax evaded, thereby utilizing an impermissible unit of prosecution under the federal tax evasion statute, 26 U.S.C. § 7201?

2. Whether consecutive sentences may be imposed, consistent with the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, for a charge to which the United States Sentencing Guidelines ("the Guidelines") applies and to charges that predate the effective date of the Guidelines, when the Guidelines count embodies as relevant conduct the same tax loss punished in the pre-Guidelines counts, or whether, as the Ninth Circuit has held, a court may not count the same tax losses twice in imposing sentences on Guidelines and pre-Guidelines counts without violating the Double Jeopardy Clause?

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*Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

Petitioner, William Pollen, respectfully requests that a Writ of *Certiorari* be issued to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned proceeding on October 13, 1992, in which an order denying a Petition for Rehearing was entered on November 10, 1992.

## OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Third Circuit, *United States of America v. William Pollen*, 978 F.2d 78 (3d Cir. 1992), is reprinted in the Appendix hereto at 1a.

2. The Order entered by the United States Court of Appeals for the Third Circuit Denying the Petition for Rehearing, reported at 978 F.2d 78 (3d Cir. 1992), is reprinted in the Appendix hereto at 31a.

3. The oral opinion of the United States District Court for the District of New Jersey, *United States of America v. William Pollen*, Indictment No. 86-110 (D.N.J. 1992), which is unpublished, is reprinted in the Appendix hereto at 32a.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the Judgment and Order of the United States Court of Appeals for the Third Circuit, *United States of America v. William Pollen*, 978 F.2d 78 (3d Cir. 1992), filed on October 13, 1992. The Third Circuit entered an Order Denying a Petition for Rehearing on November 10, 1992.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the federal tax evasion statute, 26 U.S.C. § 7201, are involved in this case.

1. **United States Constitution, Amendment V.**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on

> a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added).

2. **26 U.S.C. § 7201.**

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

## STATEMENT OF THE CASE

This case requires this Court to decide for the first time two criminal law issues of constitutional magnitude, each of which significantly impacts the double jeopardy rights of certain criminal defendants, and each of which is the subject of a split in the circuits. First, this case places squarely before this Court the question of the proper unit of prosecution under the federal tax evasion statute, 26 U.S.C. § 7201 — namely, whether such unit is

the tax evaded or, as the Third Circuit held, individual attempts to evade it. Second, because Petitioner pleaded guilty both to counts requiring that sentence be imposed under the United States Sentencing Guidelines (the "Guidelines") and to pre-Guidelines counts charging acts predating November 1, 1987, this case raises the issue of whether Petitioner was doubly punished in violation of the Double Jeopardy Clause by the consecutive sentence imposed for acts charged in the pre-Guidelines counts, which had already been taken into account and punished as "relevant conduct" under the Guidelines sentence. A conflict in the circuits currently exists as to whether this type of consecutive sentence violates the Double Jeopardy Clause of the Fifth Amendment.[1]

On May 3, 1991, Dr. William Pollen ("Pollen"), entered a guilty plea to counts 1, 2, 3 and 5 of Superseding Indictment No. 86-110, which had been filed on October 1, 1990 (48a, 50a).[2] Count 5 required that sentence be imposed under the Guidelines, since it involved an offense which occurred after November 1, 1987. Counts 1, 2 and 3 were pre-Guidelines counts. Each of the four counts to which Pollen pleaded guilty charged him with attempting to evade and defeat payment of his personal income taxes for the identical seven years: 1967; 1970; 1972 through 1975; and 1982 (58a-61a; 63a). The counts differed in that each charged different attempts to evade these same seven taxes.[3]

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1. *See* discussion at pp. 19-20 *infra*.

2. The United States District Court had original and exclusive jurisdiction over this criminal case, pursuant to 18 U.S.C. § 3231.

3. In return for Pollen's entry of a guilty plea on those four counts, the government moved to dismiss counts 4, 6, 7 and 8 of the Superseding Indictment. Count 1 of a related second indictment, Indictment No. 90-400, which was the only count of that indictment in which Pollen was named, was also dismissed.

Counts 1 and 2 charged, respectively, that Pollen attempted to evade payment of his personal taxes for the seven years noted above by causing approximately $690,000 and $285,000 on two separate dates to be transported to the Swiss Bank Corporation in Toronto, Canada with further instructions to transfer the gold to Zug, Switzerland. Count 3 charged that Pollen attempted to evade payment of these same seven taxes by engaging in a continuous scheme and course of conduct to conceal his assets, from October 5, 1981 through December 18, 1984. Count 5 charged that on or about August 22, 1990, Pollen again attempted to evade payment of these same seven taxes by maintaining more than $350,000 in gold bars and jewelry in certain safety deposit boxes in North Carolina.

Following a sentencing hearing, the district court imposed a sentence of five years imprisonment on count 5 of the Indictment (the "Guidelines count"). It also imposed a sentence of five years on each of counts 1, 2 and 3 (the "pre-Guidelines counts") to be concurrent to each other but consecutive to the sentence imposed on count 5.[4]

On appeal from the district court's sentencing determination, the United States Court of Appeals for the Third Circuit vacated Petitioner's sentence on count 5, based on an improper determination by the district court under the Guidelines concerning Pollen's role in the offense, but affirmed the balance of the sentence, including its consecutive nature.

Petitioner seeks the grant of this Petition for Writ of *Certiorari* on the double jeopardy issues, despite the fact that the Third Circuit

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4. The district court also sentenced Pollen on count 5 to a three-year term of supervised release with special conditions (including repayment of all taxes, interest and penalties), a fine of $75,000 and a special assessment of $50.00. A special assessment of $50.00 was also imposed on count 3 (40a-45a; 48a-57a ).

reversed his Guidelines sentence on the narrower grounds that the district court had applied an incorrect, upward adjustment for his role in the offense. The reversal of Petitioner's Guidelines sentence on count 5 could have led, at most, to a reduction of fourteen months in his sentence.[5] The violation of his double jeopardy rights, however, has led to an improper consecutive sentence of five years. Hence, despite the partial relief afforded by the Third Circuit's decision, Petitioner is still subject to an unconstitutional "double punishment."

## REASONS FOR GRANTING THE WRIT

### I.

**THE ISSUE RAISED BY THIS CASE AS TO THE PROPER UNIT OF PROSECUTION UNDER THE FEDERAL TAX EVASION STATUTE, 26 U.S.C. § 7201, AND THE RELATED ISSUE, WHETHER CONSECUTIVE SENTENCES IMPOSED FOR SEPARATE ATTEMPTS TO EVADE THE SAME TAX OR TAXES VIOLATE A DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND ARE NOW THE SUBJECT OF A SPLIT IN THE CIRCUITS.**

As the Third Circuit noted in this case, this proceeding "raises

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5. On resentencing, which occurred on December 17, 1992, the district court imposed a sentence of 57 months on the Guidelines count, or three months less than had originally been imposed. This new sentence has been appealed to the Third Circuit on the grounds that the district court erroneously adjusted upward Petitioner's sentence under the Guidelines for his role in the offense by finding that he was the leader of two other people, a finding which has no basis in the record. This appeal is currently pending.

a unique question: whether a defendant can be charged and punished separately for several distinct affirmative acts of evasion committed with regard to taxes owed for the identical set of years." 978 F.2d at 85 (12a). The answer to this question requires a determination of the proper unit of prosecution for evasion of payment of taxes under 26 U.S.C. § 7201. If separate acts do not constitute legitimate units of prosecution, *i.e.*, separate crimes, then consecutive sentences based upon separate evasive acts, each of which is charged as a separate count in the indictment, violates the Double Jeopardy Clause of the Fifth Amendment. This Court has never decided the issue of what constitutes the appropriate unit of prosecution under 26 U.S.C. § 7201.[6]

Moreover, the Third Circuit's holding that the unit of prosecution for evasion of payment under 26 U.S.C. § 7201 is the individual evasive act represents the first time that a court of appeals has reached this conclusion. This holding conflicts with the holdings of the other circuits in tax evasion cases, which have uniformly stated that it is evasion of *the tax* which constitutes the crime.[7] *E.g.*, *United States v. Lennon*, 246 F.2d 24, 27 (2d Cir.

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6. In *Spies v. United States*, 317 U.S. 492 (1943), this Court held that, "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished." 317 U.S. at 499. It then stated that multiple acts taken by the defendant might together constitute "a willful attempt to evade a tax." *Id.* Since 1943 when Spies was decided, this Court has not further interpreted the tax evasion statute. The instant case presents an excellent opportunity for this Court to clarify specifically the issue of the appropriate unit of prosecution under section 7201.

7. The United States itself appears to read section 7201 of Title 26 as providing that evasion of the tax constitutes the unit of prosecution since it routinely charges evasion of separate taxes in separate counts. In fact, the *Criminal Tax Manual* of the Department of Justice includes a form of indictment that charges evasion of payment by tax year and not by attempt. *Criminal Tax Manual*, Tax Division, Dept. of Justice, Form Indictment No. 10. The indictment in the instant case is the only indictment, discussed in reported cases, framed so as to charge individual acts or means of evasion as the crime.

1957) (individual's false statements on a tax return are not separately chargeable); *United States v. Smith*, 335 F.2d 898, 901 (7th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965); *Petition of United States*, 306 F.2d 737 (9th Cir. 1962); *see also Chanen Din Khan v. Barber*, 147 F. Supp. 771, 774 (N.D. Cal. 1957), *aff'd*, 253 F.2d 547 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); *United States v. Stoehr*, 100 F. Supp. 143, 159 (M.D. Pa. 1951), *aff'd*, 196 F.2d 276 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952); *United States v. Goldberg*, 206 F. Supp. 394, 397 (E.D. Pa. 1962), *aff'd*, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964); *United States v. Minker*, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963) (a charge for evasion of each gambling excise tax under § 7201 is proper).

The Third Circuit held that the Superseding Indictment charging individual attempts to evade, rather than evasion of payment of the tax itself, is not multiplicitous, that the indictment reflects the proper unit of prosecution, and that, therefore, the resulting consecutive sentences did not violate the Double Jeopardy Clause.

**A. That The Tax And Not The Attempt Is The Appropriate Unit Of Prosecution Is Clear From The Legislative Intent As Reflected In The Plain Language Of The Statute.**

The Third Circuit correctly stated that whether counts of an indictment are multiplicitous depends upon "whether the legislature intended to make separately punishable the different types of conduct referred to in the various counts." 978 F.2d at 85 (13a), *quoting United States v. Stanfa*, 684 F.2d 85, 87 (3d Cir. 1982).

The Third Circuit accurately noted that legislative intent is determined by: (1) the plain language of the statute; (2) the

legislative history of the statute[8] and, if the legislative intent remains ambiguous; then (3) application of the "rule of lenity."[9] 978 F.2d at 85 (13a-14a). As the Third Circuit further recognized:

> the Supreme Court has emphasized that "[i]t is Congress, and not the prosecutor, which establishes and defines offenses." *Sanabria v. United States*, 437 U.S. 54, 69, 98 S. Ct. 2170, 2181 (1978).

978 F.2d at 85 (13a).

Here, the legislative intent, based upon the plain language of the statute, is clear. It is the *tax* and not the *attempt* that is the proper unit of prosecution. Section 7201 prohibits the single crime of tax evasion, whether accomplished by evasion of assessment or evasion of payment of a tax.[10] Where evasion of *assessment* is charged (generally by the filing of a false tax return) the unit of prosecution is the individual tax return, *i.e.*, the tax evaded, *see, e.g., United States v. Duncan*, 850 F.2d 1104, 1112 n. 8 (6th Cir. 1988); *United States v. Minker*, 312 F.2d 632, 636 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963), and not each false statement on a

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8. The Third Circuit found that the legislative history of 26 U.S.C. § 7201 was of no assistance on the issue of the allowable unit of prosecution. 978 F.2d at 86 n. 14 (16a).

9. *See, e.g., Bell v. United States*, 349 U.S. 81, 83-84 (1955); *United States v. Kimberlin*, 781 F.2d 1247, 1253 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); *United States v. Thompson*, 624 F.2d 740, 742 (5th Cir.), *reh. denied*, 631 F.2d 732 (5th Cir. 1980).

10. The elements of tax evasion are: (1) a tax deficiency; (2) willfulness; and (3) an affirmative act constituting evasion. *United States v. McGill*, 964 F.2d 222, 229-30 (3d Cir. 1992).

tax return. *United States v. Lennon*, 246 F.2d 24, 27 (2d Cir.), *cert. denied*, 355 U.S. 836 (1957). No reported case holds that each individual false statement on a tax return or other attempts to evade taxes in a single year can be prosecuted separately.

Evasion of payment and evasion of assessment are merely two different types of tax evasion. *United States v. Mal*, 942 F.2d 682 (9th Cir. 1991); *United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990), *vacated and remanded on other grounds*, 111 S. Ct. 747 (1991); *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990) (emphasizing that the two types of evasion are created by the same sentence of the same statute). Thus, if evasion of *payment* is charged, the unit of prosecution must be the unpaid tax itself, just as it is in an evasion of assessment case. *E.g., United States v. Duncan, supra; United States v. Minker, supra.* It cannot be each act taken to avoid payment.[11] If Congress intended the unit of punishment for evasion of assessment cases to differ from that for evasion of payment cases, surely it would have reflected that intent in the statutory language. Congress could not have intended *identical language* to create different units of prosecution for the two types of tax evasion.

The logic of this conclusion is enforced by the fact that the "harm" which this criminal statute is designed to remedy is the Government's inability to collect a tax, whether these collection

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11. The acts taken to avoid payment of a particular tax are no more than the means used to accomplish the evasion. *Lott v. United States*, 309 F.2d 115, 118 (5th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *United States v. Voorhies*, 658 F.2d 710 (9th Cir. 1981) (defendant's multiple evasive acts are evidence of his intent to commit the crime); *United States v. Warner*, 428 F.2d 730, 735 (8th Cir. 1970). Thus, under Rule 7(c) of the Federal Rules of Criminal Procedure, the various means could have collectively been included in each count for each tax year. Rule 7(c) states that an indictment may allege "in a single count . . . that the defendant committed [the offense] by one or more means."

efforts are frustrated by non-payment or non-assessment. If one defendant engaged in seven transactions to secrete $100 that would otherwise be used to pay a tax due, and another defendant engaged in two transactions to accomplish the same end, the harm to the public—the loss of $100 in tax income—is exactly the same. Both these defendants should face the same charge and range of sentence. Their actions are no more than the means used to commit the offense of tax evasion (*see* footnote 11 *supra*).

That the proper unit of prosecution is each tax owed, and not each act taken to evade payment, is supported by analogy to other statutes. For example, 31 U.S.C. § 5324(3) makes it a crime to structure a transaction to avoid currency reporting requirements.[12] Despite government arguments that each act in furtherance of the "structure" (*i.e.*, each deposit of under $10,000) may be charged as a separate violation, both the Seventh and the Tenth Circuits have recently rejected this position and held that the structured transaction and not each act taken to create the structure is the proper unit of prosecution. *United States v. Dashney*, 937 F.2d 532, 541-42 (10th Cir.), *cert. denied*, 112 S. Ct. 402 (1991); *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992). The *Davenport* court aptly noted:

> The government's position leads to the weird result that if a defendant receives $10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits . . . . Unable as we are to say that a defendant's conduct is more

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12. 31 U.S.C. § 5324 states, in pertinent part that, "No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction . . . . (3) structure or assist in structuring or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

> dangerous the greater the number of deposits, we are unable to construct any rationale for the government's position.

929 F.2d at 1171-72. Here, too, the government's position leads to the "weird result" that a defendant who empties two bank accounts to evade payment of one or more taxes, may receive a sentence double that of the tax evader who empties only one bank account but just as successfully evades payment of identical taxes.

Finally, the language in other tax statutes makes clear that Congress could have clearly stated in Section 7201, but did not, that each attempt to evade constitutes a separate violation. Congress did so specify in 26 U.S.C. § 7206(4) which states:

> *Any person who* . . . [r]emoves, *deposits, or conceals* . . . *any goods* or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat . . . collection of any tax imposed by this title . . . shall be guilty of a felony.

(Emphasis added). The unit of prosecution under this section is each individual act taken to conceal assets. The language of this section in which the focus is on the acts taken to evade payment of a tax, stands in stark contrast to that of section 7201, in which the focus is on the tax evaded. *United States v. Duncan, supra,* 850 F.2d at 1112 n. 8.

**B. The Third Circuit's Holding Defines No Clear, Workable Unit Of Prosecution, Ignores The Rule Of Lenity, And Has Imposed A Significant Injustice On Petitioner.**

*1. The Third Circuit's Interpretation Creates A Number Of Possible Units Of Prosecution, A Result Which Could Not Have Been Intended By Congress.*

Although it does not seem that Congressional intent as to the appropriate unit of prosecution under a single statute could, by definition, vary according to the circumstances of the case unless such variables were explicitly provided by Congress, the Third Circuit limited its holding concerning the appropriate unit of punishment under section 7201 to "the facts of this case." 978 F.2d at 87 (18a). Thus, the court limited its holding that individual acts of evasion, as opposed to individual tax years, constitute separate crimes to those cases "where the acts of evasion charged in each count involve funds far greater than the taxes owed for any particular year and . . . each act was intended to evade payment of all taxes owed." 978 F.2d at 86 (16a).

The court suggested that the appropriate unit of prosecution may be different if only a single year's taxes were involved, or if the government were to splinter the offense of tax evasion "into a number of attempts greater than the number of calendar years for which taxes were evaded."[13] 978 F.2d at 87 (18a).

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13. The Third Circuit also distinguished evasion of payment cases from evasion of assessment cases, stating that fraudulent actions in assessment cases are more likely to be directed to a single year and therefore that using the act as the unit of prosecution is especially appropriate in the former. However, the Ninth Circuit has stated that identical acts frequently evade both payment and assessment of taxes. *United States v. Mal*, 942 F.2d 682, 688 (9th Cir. 1991). For example, if a defendant transfers assets to prevent the IRS from determining his true tax liability, he has attempted to evade assessment; if he accomplishes that same transfer after a tax liability has become due, he has attempted to evade payment.

In addition, despite its clear recognition that *legislative intent* controls, the Third Circuit relied for its decision, at least in part, on the *defendant's intent.* Noting that Pollen admitted during his guilty plea colloquy that he attempted to avoid all taxes by each action charged, the Third Circuit found that Defendant's intent somehow supported its decision that acts—not tax years—are the appropriate unit of prosecution.[14] Thus, under the Third Circuit's analysis, not only would the unit of prosecution change depending upon the amount of the taxes owed as well as whether § 7201 was violated with respect to assessment or payment of taxes, but it also would vary depending upon the defendant's intent. 978 F.2d at 87 (16a). The different iterations permissible under the Third Circuit's decision could not have been intended by Congress.[15]

The Third Circuit held that interpreting the "plain language" of § 7201 to mean that the tax is the unit of prosecution would

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14. In addition to the fact that the court should not even have considered the defendant's intent, Pollen's statement does not necessarily support the Appellate Court's position. The Government could have drafted the indictment to avoid multiplicity *and* remain true to Pollen's admitted intent. Specifically, the indictment could have charged that each of the acts of evasion that are now charged separately constitute a course of conduct intended to evade the tax due for each year. *United States v. Shorter,* 809 F.2d 54, 57 (D.C. Cir. 1987).

15. Moreover, by permitting the government to pick and choose its units of prosecution, charging either tax years or isolated evasive acts as separate crimes, vests unfettered discretion in prosecutors to draft indictments as they choose. Such discretionary charging is contrary not only to Congressional intent as manifested in the holding of 26 U.S.C. § 7201, but also to the Sentencing Reform Act of 1984, which required that district courts "shall consider the need to avoid unwarranted sentencing disparities." 18 U.S.C. § 3553(a)(6). The United States Sentencing Commission has stated that a drawback to the charge offense system is the charging discretion held by prosecutors. U.S.S.G. Ch. 1 Pt. A(4)(a) Policy Statement. *See also United States v. Lieberman,* 971 F.2d 989 (3d Cir. 1992) (finding inappropriate manipulation of an indictment and consequent illegal sentencing disparity). The Third Circuit's decision in the instant case broadens rather than controls, the charging discretion of prosecutors.

elevate in importance the phrase "any tax" above the rest of that provision. In its attempt to avoid this perceived interpretative pitfall, the Third Circuit committed exactly the same error; its interpretation elevated in importance the language, "attempts in any manner" over all other words in the section.

The Third Circuit found support for its decision that the evasive act is the unit of prosecution under § 7201 in cases holding that the crime of tax evasion is complete after a single attempt. 978 F.2d at 86 (15a). While it is true that a single attempt completes the crime of tax evasion if the other elements are present, it does not follow that the attempt is the unit of prosecution, and that additional acts constitute additional crimes. Certainly, a conspiracy under 18 U.S.C. § 371 is complete when a single overt act is performed. It is axiomatic, however, that each subsequent overt act does not constitute a separate conspiracy or crime if each such act advances only one scheme or agreement. *See, e.g., United States v. McCarty,* 611 F.2d 220, 223 (8th Cir. 1979). Similarly, in a bank fraud case brought under 18 U.S.C. § 1334, it is the scheme which is punishable, not each act in furtherance of the scheme. *E.g., United States v. Heath,* 970 F.2d 1397 (5th Cir. 1992) (indictment was multiplicitous, which charged two fraudulent acts in furtherance of a single scheme as separate crimes).

Instead, it follows that additional attempts to evade payment or assessment of a tax are mere surplusage in an indictment, and that, in this case, the crimes of evasion of each tax due were complete in 1984 when Pollen transported $690,000 out of the United States. This is precisely the holding of *United States v. Kirkman,* 755 F. Supp. 304 (D. Idaho 1991).[16]

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16. The *Kirkman* court held that the Sentencing Guidelines cannot be applied where the offense of tax evasion was completed prior to November 1, 1987, although the defendant performed evasive acts subsequent to that date. The subsequent evasive acts were not the proper basis for separate sentences under the Guidelines since they did not constitute separate crimes; they were effectively surplusage.

*2. The Third Circuit's Holding Ignores The Rule Of Lenity.*

The Third Circuit acknowledged that if the intent of the legislature is not clear, the "rule of lenity" should be applied in determining the appropriate unit of prosecution. This rule requires that any ambiguity within a criminal statute must be "resolved in favor of the defendant." 978 F.2d at 85 (14a). Here, however, the Third Circuit ignored the rule of lenity despite having found an ambiguity in the relevant statute.

Specifically, the Third Circuit noted that cases are legion which hold that the word "any" in a criminal statute is ambiguous in the context of deciding the proper unit of prosecution. 978 F.2d at 87 n. 19(18a-19a). The case of *United States v. Coiro,* 922 F.2d 1008, 1014 (2d Cir.), *cert. denied,* 111 S. Ct. 2826 (1991) in which these cases are summarized, holds ambiguous the obstruction of justice statute for use of the words "*any* person," and applies the rule of lenity, vacating a sentence on one of two multiplicitous counts in an indictment. In *United States v. Sahley,* 526 F.2d 913, 918 (5th Cir. 1976) the Fifth Circuit held that the words "*any* false statement or report" in 18 U.S.C. § 1014 mean that a document containing multiple false statements must be treated for purposes of sentence and pleading as a single count. Likewise, in this case, the words "attempts in *any* manner" are ambiguous, requiring application of the rule of lenity. *See also United States v. Marino,* 682 F.2d 449, 454 n. 5 (3d Cir. 1982).

Instead of applying the rule of lenity, the Third Circuit upheld a sentence that (as is discussed below) imposes a greater burden on Pollen and a greater burden on all similarly situated defendants.

*3. The Third Circuit's Holding Has Caused Real Injustice To Petitioner.*

The Third Circuit's decision states that it would have been correct for the government to have drafted the indictment with

seven different counts, one for each tax evaded. 978 F.2d at 84 (12a). It then holds that the indictment was also correctly drafted *under the circumstances of this case*, with separate acts of evasion constituting the offense charged in each count. Implicit in this decision is the notion that the unit of prosecution chosen would not affect Pollen's sentence, since the number of tax years involved exceeds the number of counts to which Pollen pleaded guilty.

However, Pollen is suffering a much harsher double sentence with the indictment in its present form. Moreover, it hardly seems possible that both forms of the indictment could correctly reflect congressional intent.

If the indictment had been drafted properly to assert a separate violation of 26 U.S.C. § 7201 for each unpaid tax (*i.e.*, by tax year), Pollen's entire course of conduct, consisting of all acts listed in the current indictment, should have been included in each count.[17] Since one of these acts occurred in 1990, the Sentencing Guidelines would have governed the Defendant's entire sentence rather than only his sentence under count 5. Alternatively, if each crime is complete after the first evasive act, as decided by the Third Circuit, the later evasive acts would be surplusage, and all counts would be pre-Guidelines counts. *United States v. Kirkman, supra.* In either event, Petitioner's sentence and its impact on him in terms of the time he must actually serve would be far less than under the indictment as structured with both Guidelines and pre-Guidelines counts.[18]

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17. This follows from the Third Circuit's discussion of the fact that acts of evasion cannot be attributed to specific tax years. 978 F.2d at 86-87 (16a-17a).

18. The Guidelines require a grouping of related counts resulting in essentially concurrent sentences in situations such as this. U.S.S.G. § 3D1.2. If none of the counts were Guidelines counts, Petitioner would serve less time, even if those sentences were consecutive, since he would be subject to release by the parole board under pre-Guidelines regulations.

## II.

**WHETHER THE IMPOSITION OF A PRE-GUIDELINES SENTENCE CONSECUTIVE TO A GUIDELINES SENTENCE VIOLATES THE DOUBLE JEOPARDY CLAUSE WHERE THE GUIDELINES SENTENCE WAS BASED ON, AND PUNISHED, ALL RELEVANT CONDUCT INCLUDING THAT CHARGED IN THE PRE-GUIDELINES COUNTS, IS THE SUBJECT OF A CONFLICT IN THE CIRCUITS AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.**

The second double jeopardy issue presented by this case, whether a consecutive sentence on a pre-Guidelines count can be imposed, when the Guidelines sentence has been calculated based on the conduct which formed the basis for the pre-Guidelines counts, has been the subject of conflicting decisions in several circuit courts, but has never been decided by this Court. The tax Guidelines applied in this case base the Petitioner's sentence upon the "tax loss" to the government, which is "the total amount of tax the taxpayer attempted to evade." U.S.S.G. § 2T1.1(a). The Application Note to the tax evasion Guideline provides that:

> In determining the total tax loss attributable to the offense (*see* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.

U.S.S.G. § 2T1.1 (App. Note 3). The trial court in this case used these "relevant conduct" principles to include as a tax loss for calculation of the Guidelines sentence, all taxes that Petitioner had

not paid. The trial court then considered the same losses in setting the sentences on the pre-Guideline counts and imposed on those counts five-year terms of imprisonment consecutive to that imposed on the Guidelines count.

The Third Circuit held that imposition of such a consecutive sentence on pre-Guidelines counts is within the discretion of the sentencing court. 978 F.2d at 91-2 (29a-30a). However, although this constitutional issue was argued by the parties below, the court of appeals failed to address whether such a consecutive sentence is constitutional when calculation of the Guidelines sentence was based on conduct which formed the basis for the pre-Guidelines conviction.

Rather, the Third Circuit rested its affirmance on the proposition that it is within the sentencing court's discretion to sentence consecutively or concurrently. Although this decision is consistent with decisions of the Fourth, Fifth, Seventh and Eighth Circuits,[19] *see United States v. Ewings*, 936 F.2d 903, 910 (7th Cir.

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19. Aside from the constitutional infirmity of the Third Circuit's decision, the decision subverts the intent of the Sentencing Guidelines to promote uniformity in sentencing. 18 U.S.C. § 991(b)(1)(B). The lack of uniformity, which can arise when consecutive sentences on pre-Guidelines and Guidelines counts are imposed, has been cautioned against by the United States Sentencing Commission as follows:

> If the relevant conduct for an offense committed on or after November 1, 1987, overlaps with conduct sanctioned as part of a pre-November 1 count, there would be a potential for double counting unless the pre-guideline counts were sentenced concurrently. The court will have to carefully fashion the sentence with these concerns in mind.

U.S. Sentencing Comm'n, *Questions Most Frequently Asked About the Sentencing Guidelines*, 4 (Dec. 1990).

1991); *United States v. Lincoln*, 925 F.2d 255, 256-57 (8th Cir.), *cert. denied*, 111 S. Ct. 2838 (1991); *United States v. Parks*, 924 F.2d 68, 73 (5th Cir. 1991); *United States v. Garcia*, 903 F.2d 1022, 1024-26 (5th Cir.), *cert. denied*, 111 S. Ct. 364 (1990); *United States v. Watford*, 894 F.2d 665, 669 (4th Cir. 1990), the Ninth Circuit has recently decided two cases which conflict directly with the result reached in each of these other circuits. *United States v. Niven*, 952 F.2d 289, 293-94 (9th Cir. 1991); *United States v. Scarano*, 975 F.2d 580, 586 (9th Cir. 1992).

In *Niven*, the Ninth Circuit stated that the more general issue (decided by the Third Circuit and the other circuits noted above) regarding a trial court's general discretion to sentence consecutively on a pre-Guidelines count, is distinct from the constitutional issue arising when a trial court calculates a Guidelines sentence using losses which have served as the basis for the consecutive pre-Guidelines sentence.[20] *United States v. Niven*, *supra*, 952 F.2d at 294.

In both *Niven* and *Scarano*, the Ninth Circuit remanded for a decision as to whether the same tax losses were being counted twice by the consecutive sentences imposed. In both cases, the Ninth Circuit held that the Guidelines do not empower a sentencing court, in calculating the loss attributable to relevant criminal conduct, to count *twice* the same loss already considered by imposing a consecutive pre-Guidelines sentence, since such a consecutive sentence violates the constitutional prohibition

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20. In *Niven*, the defendant was sentenced after conviction of a mail fraud and wire fraud scheme. The Section 2F Guideline applied in *Niven*, like the Section 2T Guideline applied here, bases a sentence on the total loss incurred during a common scheme or plan. In *Niven*, the defendant received a five-year sentence on the pre-Guidelines counts and a consecutive 51-month sentence on the Guidelines counts. It appeared that the same losses employed for Guidelines purposes were considered in setting the sentence for the pre-Guidelines counts and this case was remanded for this determination.

against double jeopardy. *United States v. Niven, supra; United States v. Scarano, supra.* These Ninth Circuit holdings have created a split in the circuits on the important question of consecutive sentencing in cases involving both Guidelines and pre-Guidelines charges. The decision and the reasoning of the Ninth Circuit should be adopted by this Court both to resolve the conflict among the circuit courts on this important question and to promote the goal of sentencing uniformity which the Guidelines were designed to foster.

## CONCLUSION

For the foregoing reasons, a Writ of *Certiorari* should be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: February 5, 1993

## APPENDIX A — OPINION – *UNITED STATES OF AMERICA V. WILLIAM POLLEN,* 978 F.2D 78 (3D CIR. 1992)

UNITED STATES of America,

v.

William POLLEN, Appellant.

No. 91-5703.

United States Court of Appeals,
Third Circuit.

Argued May 7, 1992.

Decided Oct. 13, 1992.

Rehearing and Rehearing In Banc
Denied Nov. 10, 1992.

Stephen M. Orlofsky, Anne C. Singer (argued), Blank, Rome, Cominsky & McCauley, Cherry Hill, N.J., for appellant.

Michael Chertoff, U.S. Atty., Glenn J. Moramarco (argued), Asst. U.S. Atty., Newark, N.J., for appellee.

Before: BECKER, NYGAARD and ROTH, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

This appeal requires us to determine the allowable units of

prosecution for violations of 26 U.S.C. § 7201 (1988), a federal tax evasion statute, as well as several sentencing issues raised by appellant, Dr. William Pollen. Pollen appeals from the sentences imposed by the district court after his plea of guilty to four counts of tax evasion.[1] He argues that these four counts are impermissibly multiplicitous and that as a consequence he has been subjected to multiple punishment for the same violations of section 7201, as a result prohibited by the Double Jeopardy Clause of the Fifth Amendment. In addition, Pollen asserts that the district court erred in calculating the amount of tax evaded and in increasing his offense level by four points to reflect his role in the offense charged in Count Five, the sole count governed by the Sentencing Guidelines.[2] Finally, Pollen contends that, even assuming his other arguments fail, the district court abused its discretion in imposing concurrent sentencing for his pre-Guidelines and Guidelines offenses.

We find that the counts to which Pollen pleaded guilty charge allowable units of prosecution under section 7201 and so are not impermissibly multiplicitous. Thus Pollen has not been subjected to multiple punishment for the same offense in violation of the Double Jeopardy Clause. Further, the district court did not err in calculating the amount of tax evaded or in imposing concurrent sentences for Pollen's pre-Guidelines and Guidelines offenses. We agree, however, with Pollen's contention that the district court

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1. Specifically, Pollen pleaded guilty to Counts One, Two, Three, and Five of his Superseding Indictment.

2. Count Five charged an offense which occurred after November 1, 1987, the effective date of the Sentencing Reform Act of 1984, and so required that a sentence be imposed under the United States Sentencing Guidelines. ("U.S.S.G."). Counts One, Two, and Three charged offenses occurring prior to that date.

committed plain error in increasing his offense level by four levels to reflect Pollen's role in the offense charged in Count Five. Consequently, we will vacate the sentence imposed on that count and remand to the district court for further sentencing proceedings in light of this opinion.

I.

The guilty plea that comprises the basis of this appeal is not the first chapter in the saga of Pollen's attempts to evade his obligation to pay personal income taxes to the United States government. In April of 1972 Pollen was indicted by a federal grand jury in the District of New Jersey on three counts of income tax evasion for the years 1965, 1966, and 1967. The charges stemmed from an Internal Revenue Service. ("IRS") investigation which revealed that between 1965 and 1967 Pollen deposited $650,000 in a South Amboy, New Jersey, bank without reporting any income relating to these deposits to the IRS.[3]

Prior to his arraignment on these charges, Pollen fled. A bench warrant was issued for his arrest, and on May 6, 1972, Pollen was apprehended in Canada. In March of 1973, Pollen pled guilty to evading $146,987 in taxes due for the 1967 tax year. When he failed to appear for his scheduled sentencing on May 18 of that year, a bench warrant was once again issued for his arrest. Pollen managed to evade custody until May 7, 1974, almost a year later. Once apprehended, he was given a five-year sentence, the statutory maximum penalty for tax evasion.

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3. The IRS learned from an informant that the unreported income was eventually placed in accounts in Switzerland. According to the informant, on one occasion Pollen's first wife wrapped $180,000 in currency to her midsection, pretended she was pregnant, and slipped past Customs Officials to enter Switzerland.

*Appendix A*

Meanwhile, on May 12, 1972, in response to a petition filed by the IRS, the district court appointed a receiver for Pollen's estate, with instructions to take custody of all property belonging to Pollen and his wife and to satisfy Pollen's tax liens for calendar years 1965-67. Throughout the majority of the receiver's tenure from 1972 through 1978, Pollen refused to cooperate with the receiver's attempts to fulfill his court-imposed duty to satisfy Pollen's existing tax liens. In fact, during that period Pollen had substantial assets concealed outside of the United States that he refused to disclose.[4] As a consequence of this behavior the district court entered an order of contempt against Pollen in January of 1974. This civil contempt was not purged until June of 1975.

During his tenure, the receiver collected outstanding accounts receivable from Pollen's medical practice, located and sold a number of Pollen's real estate holdings, and located bank accounts and safety deposit boxes containing gold and silver bullion and currency in numerous locales, including New Jersey, Mexico, and the Bahamas. These efforts resulted in the collection of approximately $1,300,000; $662,744 of which was remitted to the IRS to fulfill Pollen's tax obligations for 1965, 1966, and a portion of that due for 1967.[5] Pursuant to standard IRS procedure, each payment the receiver made on behalf of Pollen was applied to his total debt, including tax, interest, and penalty, for the earliest tax years with outstanding debts.

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4. For example, at some point during 1973, the receiver learned that Pollen had stored gold bullion in safety deposit boxes in Mexico. Before the receiver could retrieve these assets, Pollen sent an accomplice to move the gold, and it was never recovered by the receiver.

5. The balance was disbursed to other creditors and applied to the receiver's fees.

*Appendix A*

After his release from prison in April of 1976, Pollen continued to evade payment of his taxes and conceal assets from the IRS. As a result, on March 26, 1986, the grand jury for the District of New Jersey returned a four-count indictment against Pollen, charging him with willfully attempting to evade and defeat the payment of a large part of his United States income taxes owed for the calendar years 1965 through 1967, 1972 through 1975, and 1980 through 1982, in an amount in excess of $640,000. Again Pollen fled before he could be taken into custody, and he remained a fugitive for over four years.

Ultimately Pollen was apprehended on August 15, 1990, as the result of a successful surveillance operation of his home in Colonia, New Jersey. At the time of arrest, Pollen possessed an extensive collection of false identification, including social security cards, a number of United States and foreign passports, driver licenses, and credit cards. He also possessed a handheld computer that contained information, recorded in at least four distinct coding systems, detailing his elaborate international system for concealing assets from the IRS.

The United States subsequently presented additional evidence to the grand jury, and an eight-count Superseding Indictment was filed on October 1, 1990. On May 3, 1991, Pollen entered a plea of guilty in the United States District Court for the District of New Jersey to Counts One, Two, Three, and Five of this Superseding Indictment. Each of these four counts charged Pollen with attempting to evade and defeat payment of his personal income taxes for the same group of seven years: 1967, 1970, 1972 through 1975, and 1982. In return for Pollen's guilty plea on these counts, the government moved to dismiss Counts Four, Six, Seven, and Eight of the Superseding Indictment and Count One of a related indictment, the only count of that indictment in which Pollen was named.

*Appendix A*

Count One of the Superseding Indictment charged that on or about April 18, 1984, Pollen knowingly and willfully attempted to evade the payment of more than $400,000 in federal income taxes for the years 1967, 1970, 1972 through 1975, and 1982 by "placing part of his assets out of reach of the United States Government by causing approximately $690,000 in gold to be brought to the Swiss Bank Corporation, Toronto, Canada, with instructions to further transfer the gold to a nominee account" in Switzerland. When pleading guilty to this count Pollen admitted that he owned this gold, that at the time of the transfer he knew that he owed substantial taxes to the IRS, and that he made this transfer in an attempt to evade payment of these taxes. Supplemental Appendix ("S.A.") at 017-018.

Count Two charged that on or about June 12, 1984, Pollen attempted to evade taxes owed for the same seven tax years through transporting an additional $285,000 to the Swiss Bank Corporation in Toronto, Canada, with instructions that it be transferred to the nominee account in Switzerland. In pleading guilty to this count Pollen admitted that he owned this gold and that he made the transfer for the purpose of evading taxes that he knew he owed to the IRS. S.A. at 018-019.

Count Three charged that between October 5, 1981, and December 18, 1984, Pollen attempted to evade and defeat the payment of taxes due for the same seven years by engaging in a continuous scheme and course of conduct to conceal assets from the IRS. In pleading guilty to this count Pollen admitted that as part of this course of conduct he used currency, money orders, and cashiers checks to buy assets and pay expenditures and that he used nominees to conceal his expenditures.[6] Pollen also admitted that

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6. For example, evidence was presented at the sentencing hearing that during the latter part of 1981, Pollen used cash to pay for over $30,000 worth of swimming

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when he engaged in this course of conduct he knew that he owed the federal government substantial taxes and he conducted these transactions in this manner for the purpose of evading their payment. S.A. at 019-021.

Finally, Count Five charged that on or about August 22, 1990, Pollen attempted to evade and defeat the payment of his taxes owed for the identical seven years through placing assets out of the reach of the United States "by maintaining more than $350,000 in gold bars and coins, jewelry, and gems in safety deposit boxes at the First Union National Bank of North Carolina" under a fictitious name. When pleading guilty to this count Pollen admitted that he owned these assets and that he placed them in the safety deposit boxes specifically for the purpose of evading the payment of taxes that he knew he owed.[7] S.A. at 021-022.

Prior to sentencing, Pollen objected to his presentence report's calculation of the amount of tax that he owed and its recommended four-level Sentencing Guildeline offense level increase for Count Five, intended to reflect his leadership role in

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(Cont'd)
pool repairs and landscaping work performed at his residence in Colonia, New Jersey. In December of 1982, Pollen bought a 1983 Lincoln Town Car for $20,346 using a combination of $3,000 in cash, six cashier's checks of $2,000 each, and another check issued by a nominee. In January of 1984, Pollen purchased a 1971 Rolls Royce for $11,800, using both cash and payments from a nominee. Pollen also gave one of his accomplices $7,500 in cash to pay for Pollen's daughter's private school expenses. Between May of 1984 and May of 1985, Pollen made cash payments of $17,200 for rent on a home in Palm City, Florida. Also during this period, Pollen paid a travel agent in cash for trips to places such as Iceland, Luxembourg, London, Switzerland, Rome, Venice, Nice, Montserrat, and Saint Thomas.

7. After Pollen's arrest, two of his accomplices, Carlos and Valerie Garrett, attempted to gain access to these safe deposit boxes ahead of the government. The
(Cont'd)

that offense. Both parties presented evidence concerning the disputed sentencing issues at a three-day sentencing hearing held July 29-31, 1991. Evidence also was presented indicating that the IRS has not yet recovered all of Pollen's secreted assets, particularly those hidden in other countries.[8] At the close of this hearing, the district court imposed a sentence of five years imprisonment for Count Five, the sole Guidelines count. This sentence was based on a Sentencing Guideline calculation of an adjusted offense level of 23 and a criminal history level of 3, which produced a guideline sentence range of 57-71 months.[9] On this count Pollen was also sentenced to a three-year term of supervised release, with special conditions including restrictions on international travel, the repayment of all taxes and the payment of interest, penalties, a fine of $75,000, and a special assessment of $50. The court imposed sentences of five years for each of Counts One, Two, and Three to run concurrently with each other and consecutively with the sentence imposed for Count Five. A special assessment of $50 was also imposed on Count Three.

On August 12, 1991, Pollen filed a notice of appeal from this sentencing determination. We have jurisdiction over this appeal

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government, however, had already searched the boxes and confiscated their contents: gold bars and coins, including Mexican pesos, Canadian maple leaves, Krugerands, platinum, silver, diamonds, sapphires, rubies, pearls, watches and other jewelry valued at approximately $350,000. The Garretts, charged in a related indictment, pled guilty to conspiring with Pollen.

8. For example, at the time of his arrest, Pollen possessed four keys for safe deposit boxes in Switzerland. According to the entries in Pollen's hand-held computer, these boxes contain over 3,000 ounces of gold, none of which has been recovered by the IRS.

9. The court imposed the statutorily set maximum penalty of 60 months.

from a sentence imposed in a criminal case by virtue of 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) & (e). Our review of the district court's application and interpretation of the Sentencing Guidelines is plenary. *United States v. Murillo*, 933 F.2d 195, 197 (3d Cir. 1991). Factual findings concerning sentencing issues are subject to clearly erroneous review, and if "a judicial finding involves mixed questions of law and fact, the standard and scope of review takes on greater scrutiny, approaching *de novo* review as the issue moves from one of strictly fact to one of strictly law." *Id.* at 198.

II.

Pollen first contends that the four counts to which he pleaded guilty were impermissibly multiplicitous.[10] A multiplicitous indictment charges the same offense in two or more counts and may lead to multiple sentences for a single violation, a result prohibited by the Double Jeopardy Clause. *See United States v.*

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10. The government asserts that because the district court imposed concurrent sentences on Counts One, Two and Three, we need not decide whether Count Three is multiplicitous of Counts One and Two. Under the concurrent sentence doctrine, we have discretion to decline to resolve legal issues affecting less than all counts in an indictment if at least one count can be upheld and the sentences imposed run concurrently. *See United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1100 (3d Cir.), *cert. denied*, 493 U.S. 955, 110 S.Ct. 368, 107 L.Ed.2d 354 (1989). This doctrine is generally not invoked if it is possible that the defendant may suffer collateral consequences, such as impaired parole eligibility. *Id.*

However, at oral argument Pollen's counsel conceded that because the sentences imposed for Counts One, Two, and Three run concurrently, Pollen's Double Jeopardy argument does not apply to these counts. We will, therefore, consider only the question of whether the acts of evasion charged in these counts are multiplicitous of the offense charged in Count Five, and not whether Counts One, Two and Three are themselves impermissibly multiplicitous.

*Stanfa*, 685 F.2d 85, 86-87 (3d Cir. 1982). The interest protected by the Double Jeopardy Clause in this multiple punishment context is confined to "ensuring that the total punishment did not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 2525, 105 L.Ed.2d 322 (1989). According to Pollen, Counts One, Two, Three, and Five each charge the same offense: evasion of the payment of taxes for the identical group of seven years.[11] As a result, Pollen maintains, he has received multiple punishment for the same offense, in violation of the Double Jeopardy Clause.[12]

In response, the government first argues that because Pollen did not enter either a conditional guilty plea or a plea of nolo contendere under Rule 11(a) of the Federal Rules of Criminal Procedure, he is barred from pressing a Double Jeopardy challenge to his sentences on appeal. By pleading guilty, in the government's view, Pollen waived his right to appeal any alleged multiplicity of the sentences imposed. We disagree.

The Supreme Court, addressing this question of whether a Double Jeopardy claim of multiple punishment is barred by a defendant's guilty plea, has explained that

> [j]ust as the defendant who pleads guilty to a

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11. Counts One, Two, Three and Five each charged Pollen with evading taxes for the years 1967, 1970, 1972-75, and 1982.

12. Pollen correctly acknowledges that as a consequence of his guilty plea, he cannot attack the validity of the indictment per se, but instead is limited to challenging the constitutionality of his sentences under the Double Jeopardy Clause. *Cf. United States v. Bonavia*, 927 F.2d 565, 571 (11th Cir. 1991) (defendant who fails to object to multiplicitous counts in indictment before trial is barred from challenging indictment on appeal); *United States v. Mastrangelo*, 733 F.2d 793, 800 (11th Cir. 1984) (same).

> single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses *concede that he has committed two separate crimes.*

*United States v. Broce*, 488 U.S. 563, 570, 109 S.Ct. 757, 763, 102 L.Ed.2d 927 (1989) (emphasis added). Consequently an accused advised by competent counsel who enters a voluntary and intelligent guilty plea may not bring a collateral Double Jeopardy challenge to the sentences subsequently imposed. *Id.* at 574, 109 S.Ct. at 765. The Court noted, however, that there is an exception to this rule if the defendant's claim of multiplicity can be proven by reference solely to the indictment and existing record. *Id.* at 574-76, 109 S.Ct. at 765-66.

*Broce* thus establishes the principle that a defendant who pleads guilty to a criminal charge may subsequently assert a claim of multiple punishment in violation of the Double Jeopardy Clause "only if the violation is apparent on the face of the indictment or record." *Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991) (collateral attack on a guilty plea). *See also United States v. Makres*, 937 F.2d 1282, 1286 (7th Cir. 1991) (same); *United States v. Quinones*, 906 F.2d 924, 927 (2d Cir. 1990) (explaining, in the context of a direct appeal from a guilty plea that "the test that apparently emerges from *Broce* seems to turn on whether the claim of Double Jeopardy may be adjudicated on the face of the record or requires supplemental evidence"), *cert. denied*, __ U.S. __, 111 S.Ct. 789, 112 L.Ed.2d 851 (1991); *United States v. Montilla*, 870 F.2d 549, 552-53 (9th Cir. 1989) (applying principle of *Broce* in a direct constitutional challenge to a guilty plea). If an indictment does not raise Double Jeopardy concerns on its face, and the defendant who has pleaded guilty would only be able to

demonstrate a Double Jeopardy violation through an evidentiary hearing, then such claim, whether brought by collateral attack or direct appeal, must be rejected. *See Dermota v. United States*, 895 F.2d 1324, 1326 (11th Cir.) (collateral attack on guilty plea), *cert. denied*, __ U.S. __, 111 S.Ct. 107, 112 L.Ed.2d 78 (1990); *Montilla*, 870 F.2d at 552-53 (direct appeal from guilty plea).

In this case, Pollen asserts that the defect in his indictment is apparent on its face and that the legality of his sentences can be determined from the existing record. We will, therefore, examine the record to determine if Counts One, Two, Three, and Five are impermissibly multiplicitous, i.e., does Pollen's indictment in fact charges the identical offense in several counts.

Neither party disputes that it would have been proper to charge Pollen, in separate counts, with attempting to evade taxes for each of the seven years specified in his indictment. *See, e.g., United States v. Minker*, 312 F.2d 632, 636 (3d Cir. 1962), *cert. denied*, 372 U.S. 953, 83 S.Ct. 952, 9 L.Ed.2d 978 (1963). It is also permissible under section 7201 to charge tax evasion covering several years in a single count as a "course of conduct" in circumstances "where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years." *United States v. Shorter*, 809 F.2d 54, 58 (D.C.Cir.), *cert. denied*, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987). Pollen's indictment, however, raises a unique question: whether a defendant can be charged and punished separately for several distinct affirmative acts of evasion committed with regard to taxes owed for the identical set of years.

To adjudge whether the counts of Pollen's indictment properly charge separate offenses we must ascertain the allowable unit of prosecution under the relevant statutory provision, section 7201.

*See, e.g., United States v. Langford,* 946 F.2d 798, 802 (11th Cir. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 1562, 118 L.Ed.2d 209 (1992). We have explained that the basic inquiry in this process

> is whether proof on one offense charged requires an additional fact that proof of the other offense does not necessitate. . . . Also of central importance is whether the legislature intended to make separately punishable the different types of conduct referred to in the various counts.

*Stanfa,* 685 F.2d at 87 (quoting *United States v. Carter,* 576 F.2d 1061, 1064 (3d Cir. 1978)). In practice, the second inquiry is usually determinative of the multiplicity question. *Id. Accord United States v. Cooper,* 966 F.2d 936, 942 (5th Cir. 1992) (in determining the allowable unit of prosecution for a statutory provision, the "task is to discern Congress' intent by looking first to the plain language of the statute and then to legislative history and the overall statutory scheme of which it is a part"). Indeed, the Supreme Court has emphasized that "[i]t is Congress, and not the prosecutor, which establishes and defines offenses." *Sanabria v. United States,* 437 U.S. 54, 69, 89 S.Ct. 2170, 2181, 57 L.Ed.2d 43 (1978). Whether "a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice."[13] *Id.* at 70, 98 S.Ct. at 2182.

In this case the offense charged is tax evasion, in violation of 26 U.S.C. § 7201. To identify the congressionally intended units of prosecution for this offense, we first look to the language of this statute. *See Cooper,* 966 F.2d at 942; *United States v. Song,* 934

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13. In fact, "[f]ew, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses." *Id.*

F.2d 105, 108 (7th Cir. 1991). If this language is ambiguous, we will look next to the provision's legislative history. *See Song*, 934 F.2d at 108. Finally, if the legislative history sheds no light on Congress' intended units of prosecution, we will apply the rule of lenity. *See United States v. Marino*, 682 F.2d 449, 455 (3d Cir. 1982). Under this rule, when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant. *Id.* (citing *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971)).

> Section 7201 provides, in relevant part: Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . . . or imprisoned not more than five years, or both, together with the costs of prosecution.

26 U.S.C. § 7201.

In support of the contention that his indictment is multiplicitous, Pollen emphasizes the phrase "evade or defeat *any tax* imposed." In his view, this language evidences the section's focus on the evasion of a *specific tax*, rather than on the willful attempt or attempts to evade that tax. Simply put, according to Pollen, the allowable unit of prosecution is the tax year. It is irrelevant whether the government proves one or multiple attempts to evade: section 7201 is intended to punish the evasion of any tax, and the precise attempts made to evade the tax are irrelevant for the purposes of punishment. Through charging in distinct counts

several specific acts of evasion of the taxes owed for an identical group of years, Pollen contends, the government has arbitrarily and impermissibly splintered the crime of tax evasion into potentially innumerable offenses.

We cannot agree that Congress intended section 7201's phrase "any tax" to be elevated in importance above the rest of that provision. There is nothing in the language of this section to indicate as much. In fact, when considered in its entirety, the language of section 7201 is straightforward: it prohibits "willful attempts in any manner to evade or defeat any tax." It proscribes "attempts" to evade or defeat any tax and thus speaks in terms of the act of evasion, as well as the taxes evaded. *Cf. United States v. Coiro,* 922 F.2d 1008, 1014-15 (2d Cir.) (ascertaining the allowable unit of prosecution under 18 U.S.C. § 1510(a)), *cert. denied,* __ U.S. __, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991). Indeed an affirmative act of evasion is an element of a section 7201 violation. *See Sansone v. United States,* 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965) (the elements of a section 7201 violation include willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax). Thus the offense of tax evasion can be completed when a person willfully "attempts in any manner" to evade or defeat income tax. *See United States v. McGill,* 964 F.2d 222, 230 (3d Cir. 1992) (the offense of tax evasion "is complete when a single willful act of evasion has occurred"; *United States v. Kirkman,* 755 F.Supp. 304, 306 (D.Idaho 1991) (concluding, for statute of limitations purposes, that tax evasion is not a continuing offense). *See also Norwitt v. United States,* 195 F.2d 127, 133-34 (9th Cir.) (tax evasion is not a continuing offense), *cert. denied,* 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 635 (1952). The plain language of this section, therefore, evinces the congressional intent to allow

distinct, significant, affirmative acts of tax evasion to constitute separate section 7201 offenses.[14]

In this case, Pollen made several international transfers of hundreds of thousands of dollars and secreted equally valuable assets in the United States, in attempts to evade payment of his taxes owed for a total of seven tax years. During his guilty plea colloquy Pollen admitted that at the time of these actions he knew that he owed substantial taxes and willfully undertook these actions in order to avoid their payment. However, Pollen repeatedly emphasized that although he was aware that he owed substantial taxes at the time of this conduct, he did not know for which years he owed which portion of the taxes he was attempting to evade. Logically, then, on the facts of this case it is clear that Pollen attempted to evade all of the taxes he owed for the group of years in question through the several significant affirmative acts of evasion charged in the counts to which he pleaded guilty. Under these circumstances, where the acts of evasion charged in each count involve funds far greater than the taxes owed for any particular year, and, as Pollen himself indicated each act was intended to evade payment of all taxes owed, nor merely those owed for a particular year, we conclude that section 7201 permits a unit of prosecution based on separate significant acts of evasion. Each willful attempt to evade taxes that involves funds of an amount that cannot logically be broken down and classified as

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14. Further, nothing in section 7201's legislative history requires us to conclude that Congress intended to limit this provision's unit of prosecution to an individual tax year. *See* H.R.Rep. Nos. 1337 and 2543, 83rd cong., 2nd Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4137, 4572; 5280, 5343. Indeed, the scant legislativehistory of this provision simply does not address the question of its allowable unit of prosecution. Thus it provides no support for Pollen's attempt to circumvent the language of section 7201.

relating to a particular tax year is an allowable unit of prosecution under the plain language of this section and so can be separately charged as evasion of the taxes owed for a group of tax years. Pollen's indictment, therefore, is not impermissibly multiplicitous, and his claim pressed under the Double Jeopardy Clause fails.[15]

We agree with the government that the unit of prosecution we recognize in this opinion is particularly appropriate in a case charging tax evasion committed through the evasion of payment.[16] In cases charging evasion of the assessment of tax, the alleged fraudulent action of a defendant often directly affects assessment for a particular tax year.[17] Consequently, it is logical in that type of case to charge attempts to evade the assessment of taxes for distinct years in separate counts. Evasion of payment cases, however, stand

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15. Because we conclude that section 7201 is not ambiguous, we have no need to resort to the rule of lenity. That rule is applicable "only after it is determined that acriminal statute is ambiguous, not at the beginning of the process of construction 'as an overriding consideration of being lenient to wrongdoers.' " *United States v. Rodriguez*, 961 F.2d 1089, 1093-94 (3d Cir. 1992) (quoting *Chapman v. United States*, __ U.S. __, __, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (1991)).

16. The Supreme Court has described section 7201 as including "the offense of willfully attempting to evade or defeat the *assessment* of tax as well as the offense of willfully attempting to evade or defeat the *payment* of a tax." *Sansone v. United States*, 380 U.S. 343, 354, 85 S.Ct. 1004, 1011, 13 L.Ed.2d 882 (1965) (emphasis in original). This language has been interpreted as indicating that section 7201 proscribes the offense of tax evasion, which can be committed either by evading the assessment or evading the payment of taxes. *See, e.g., McGill*, 964 F.2d at 230; *United States v. Mal*, 942 F.2d 682, 686-87 (9th Cir. 1991); *United States v. Dunkel*, 900 F.2d 105, 107-08 (7th Cir. 1990).

17. For example, attempts to evade assessment of tax often involve the filing of a false tax return or other false documents.

in sharp contrast to evasion of assessment cases. A defendant attempting to evade payment of taxes may, as in this case, engage in transactions designed to conceal assets from the IRS in an attempt to evade the payment of taxes due for a number of years. As a result in evasion of payment cases it is logical to charge distinct, significant attempts to evade the payment of tax for the same group of tax years in separate counts.

Finally, we emphasize that our holding is circumscribed by the facts of this case: that for taxes owed for the years 1967, 1970, 1972 through 1975, and 1982, Pollen attempted to evade payment in April 1984 by transferring gold through Canada to Switzerland (Count One); he attempted to evade payment in June 1984 by transporting an additional $285,000 through Canada to Switzerland (Count Two); he attempted to evade payment between October 5, 1981, and December 18, 1984, by using currency, money orders, and cashiers checks to buy assets and pay expenditures and by using nominees to conceal his expenditures (Count III); and he attempted to evade payment in August 1990 by placing gold bars, coins, jewelry, and gems in safety deposit boxes in North Carolina under a fictitious name.[18] The unit of prosecution which we have recognized does not encompass the charging of a number of separate acts of evasion of a single year's taxes in distinct counts. We do not, therefore, need to reach the much more difficult question of whether the language of section 7201 would support the splintering of the offense of tax evasion into a number of attempts greater than the number of calendar years for which taxes were evaded.[19]

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18. As we have explained in footnote 10, under the concurrent sentence doctrine we in fact considered only whether the acts of evasion charged in Counts One, Two, and Three are multiplicitous of the offense charged in Count Five.

19. We note also that our holding is not the equivalent of concluding that, as a consequence of section 7201's phrase "in any manner," each manner of tax evasion (Cont'd)

*Appendix A*

III.

Pollen next contends that the district court erred in calculating the sentence imposed for Count Five,[20] the only count governed by the United States Sentencing Guidelines. Chapter 3, Part B of the Sentencing Guidelines permits a sentencing court to adjust a defendant's offense level in relation to the role that defendant played in committing the offense in order to reflect the defendant's culpability.[21] *See* U.S.S.G. Ch. 3, Pt. (Introductory Commentary); *United States v. Murillo*, 933 F.2d 195, 198 (3d Cir. 1991). Section 3B1.1 instructs the court to increase the offense level a defendant was an "organizer," "leader," "manager," or "supervisor" in an

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(Cont'd)
amounts to a separate unit of prosecution. This court has previously acknowledged the fact that the term "any," when used in a statutory definition of a unit of prosecution, fails to define unambiguously the unit of prosecution in singular terms. *See United States v. Marino*, 682 F.2d 449, 454 & n. 5 (3d Cir. 1982). *See also United States v. Coiro*, 922 F.2d 1008, 1014 (2d Cir.) ("the word "any" has typically been found ambiguous in connection with the allowable unit ofprosecution") (quotation omitted), *cert. denied*, __ U.S. __, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991).

20. Count Five charged Pollen with knowing and willful attempted tax evasion "by placing part of his assets out of the reach of the United States Government by maintaining more than $350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at the First Union Bank in North Carolina in a fictitious name."

21. Unless otherwise indicated, all references to the Sentencing Guidelines in this opinion will be those in effect on August 22, 1990, the date of the offense charged in Count Five, as these are the Guidelines that must be aplied. *See United States v. Chasmer*, 952 F.2d 50, 52 (3d Cir. 1991) (if Guidelines in effect on date of offense are more favorable to the defendant, they must be applied), *cert. denied*, __ U.S. __, 112 S.Ct. 1703, 118 L.Ed.2d 412 (1992).

offense.[22] In calculating Pollen's Count Five sentence, the district court increased the offense level by four levels pursuant to section 3B1.1(a) to reflect what it deemed to be Pollen's aggravating role in that offense. In doing so, the court explained that it found by a preponderance of the evidence that at least five individuals knew of Pollen's attempted tax evasion, and that "the evidence clearly shows that these people would not have been where they were for the purpose of attempting to retrieve secreted items unless in fact they were, as the government contends, orchestrated by the defendant."

Relying on our decision in *United States v. Murillo*, 933 F.2d 195 (3d Cir. 1991), Pollen now argues that this four-level increase was in error: in making this offense-level adjustment the district court improperly considered all of his "relevant conduct," as that

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22. Specifically, Guideline 3B1.1 states:

Based on the defendant's role in the offense, increase the offense level as follows:

> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity invlved five or more participants or was otherwise extensive, increase by 3 levels.
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b) above, increase by 2 levels.

U.S.S.G. § 3B1.1.

phrase is defined by the Guidelines, rather than only conduct directly relating to specific offense of conviction charged in Count Five.[23] Had the district court properly limited its section 3B1.1 inquiry to conduct relating to the offense charged in that count, Pollen maintains, the court could have concluded that he orchestrated at least five participants in criminal activity in connection with that offense.

Pollen, however, did not raise this objection to the calculation of his offense level at sentencing and therefore failed to preserve this issue properly for appeal. As a consequence, we review the matter only to assure that "plain error" was not committed *See, e.g.,* Fed.R.Crim.P. 52(b); *United States v. Gonzalez,* 918 F.2d 1129, 1138 (3d Cir. 1990) (reviewing sentencing calculations for plain error), *cert. denied,* __ U.S. __, 111 S.Ct. 1015, 112 L.Ed.2d 1097 (1991); *United States v. Castro,* 776 F.2d 1118, 1128 (3d Cir.

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23. Guideline section 1B1.3 defines relevant conduct as:

> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or . . . that otherwise were in furtherance of that offense;
>
> (2) solely with respect to offenses of character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

U.S.S.G. § 1B1.3. Violations of 26 U.S.C. § 7201 are covered by Guideline § 2T1.1, and § 3D1.2(d) requires grouping of these offenses.

1985) (objection to jury instruction that is not preserved will be reviewed for plain error), *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1233, 89 L.Ed.2d 342 (1986). Under this standard, we are "concerned only with errors that seriously affect substantial rights or compromise the fairness of the proceedings." *United States v. Martinez-Zayas*, 857 F.2d 122, 134 (3d Cir. 1988). *See also United States v. Schreiber*, 599 F.2d 534, 539 (3d Cir.) (Seitz, J. concurring) (explaining that "[t]he price an appellant pays for his failure to object is a heavier burden of persuasion. He must show that the error was plain"), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979).

In *Murillo* we resolved this question of the proper scope of a defendant's conduct to be considered in adjusting an offense level pursuant to Guideline section 3B1.1.[24] Though recognizing that generally under the Guidelines all "relevant conduct" should be considered in determining offense levels, we noted that the Background to section 1B1.3 explained that it established a rule for determining the range of conduct relevant to calculating offense levels only "in the absence of more explicit instructions in the context of a specific guideline." *Murillo*, 933 F.2d at 198. We concluded that Guideline section 3B1.1 contained a more explicit

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24. *Murrillo* resolved this issue with regard to offenses committed prior to November 1, 1990. Effective as of that date the Sentencing Commission amended the Guidelines to specify that the determination of the defendant's role in the offense is to be made on the basis of all relevant conduct "and not solely on the basis of elements and acts cited in the court of conviction." U.S.S.G. Ch. 3, Pt. (Introductory Commentary). *See also Murrillo*, 933 F.2d at 198 n. 1. The parties agree that these amendments do not apply to Pollen's Guidelines offense.

Although *Murillo* was decided on May 8, 1991 approximately three months prior to Pollen's sentencing hearing, neither the parties nor the district court appeared at that time to have been aware of its holding.

instruction and found that "the common sense reading of 'the offense' as used in § 3B1.1 is 'the offense of conviction'." *Murillo*, 933 F.2d at 198—99, Consequently,

> when determining role in the offense for all offenses committed before November 1, 1990, a court should look both to the acts or omissions of the defendant that satisfied the specific elements of the offense of conviction and to those that brought about the offense of conviction, i.e., all acts or omissions that were in furtherance of the offense of conviction.

*Id.* at 199-200. *Murillo* thus explicitly adjudged it inappropriate for a sentencing court to consider all of a defendant's "relevant conduct" when following Guideline 3B1.1 to adjust an offense level to reflect a defendant's role in the offense.

Our review of Pollen's presentence report and the transcript of his sentencing hearing reveals that Pollen is correct; neither the district court at sentencing nor that portion of the presentence report adopted by the court as portraying the evidence relating to this decision analyzed Pollen's alleged leadership role in relation to the specific offence charged in Count Five. Instead, the district court increased Pollen's offense level by four points pursuant to section 3B1.1(a) as a consequence of what it deemed to be his leadership role without determining whether the individuals allegedly orchestrated by Pollen were in any way involved in that specific offense.

In fact, the government now concedes both that *Murillo* governs this issue and that the district court did not conduct a

specific analysis of Pollen's alleged leadership role with regard to Count Five. Nevertheless, the government asserts that there are several factors to support a finding that this failure to comply with section 3B1.1(a) does not rise to the level of plain error. First, in the government's view, the miscalculation of Pollen's offense level should be adjudged harmless, for although no specific analysis of the evidence was conducted, it was clear that the actions of at least two individuals, Valerie and Carlos Garrett, were orchestrated by Pollen in direct connection to the Count Five offense. Pursuant to 3B1.1(c), therefore, a two level increase in Pollen's offense level would have been appropriate. Further, according to the government, the district court at sentencing intimated that it would have departed upward from a lower Guideline range to impose the same statutory maximum five-year sentence.

Second, the government contends that the adjustment of Pollen's offense level did not amount to a manifest miscarriage of justice, and so is not plain error, because just months after Pollen's Count Five offense the Guidelines were amended to specify that all relevant conduct, and not merely conduct relating to the offense of conviction, should be considered in making this type of adjustment in offense level.

We cannot agree. The district court clearly failed to examine the evidence concerning Pollen's leadership role specifically in connection with the offense charged in Count Five. Absent this appropriate analysis, we are unwilling to assume that the sentencing court would have found appropriate a two-level adjustment for Pollen's role in the offense pursuant to section 3B1.1(c). Furthermore, we decline to engage in the type of speculation urged by the government concerning whether the district court would have made an upward departure from a properly calculated Guideline sentence range. *See* 18 U.S.C.

§ 3742(f)(1).[25] We are dealing here with an egregious case of tax evasion. However, speculation on our part as to whether the district court would determine that Pollen's outrageous conduct warranted an upward departure is inappropriate in light of the fact that a sentencing court's decision to depart or not from the Guidelines is inherently discretionary and is not subject to appellate review. *See United States v. Colon*, 884 F.2d 1550, 1554-56 (2d Cir.), *cert. denied*, 493 U.S. 998, 110 S. Ct. 553, 107 L.Ed.2d 550 (1989); *United States v. Denardi*, 892 F.2d 269, 272 (3d Cir. 1989) (approving the *Colon* analysis). The improper four-level increase in Pollen's offense level resulted in a Guideline sentence range of 57-71 months, rather than the 46-57 month range if a two level increase had been imposed under § 3B1.1(c) or the 37-46 month range if there had been no upward adjustment for a leadership role. Where, as here, there is such a discrepancy between the sentence imposed and the correct sentencing range that the district court may ultimately find, we will not assume that such an error was harmless.

Finally, we also reject the government's contention that the miscalculation did not amount to a manifest injustice. The fact that the Guidelines were later amended has no bearing on the

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25. This section provides:

> If the court of appeals determines that the sentence–
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> > (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

18 U.S.C. § 3742(f)(1).

calculation of Pollen's Count Five sentence. If the Sentencing Guideline in effect at the time an offense is committed is more favorable to a defendant, it must be applied. *See United States v. Chasmer*, 952 F.2d 50, 52 (3d Cir.1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1703, 118 L.Ed.2d 412 (1992). The district court's improper calculation of Pollen's offense level, resulting in a significantly higher Guideline sentencing range, certainly is an error that seriously affected Pollen's substantial rights, and so amounts to plain error. *Accord United States v. Plaza-Garcia*, 914 F.2d 345, 348 (1st Cir. 1990) (finding plain error where government conceded on appeal that Sentencing Guideline calculations were erroneous). Consequently, we will vacate Pollen's sentence on Count Five, and remand to the district court for further sentencing proceedings in light of this decision and our opinion in *Murillo*.

IV.

Pollen's contention that the district court clearly erred in concluding that he owed approximately $488,000 in taxes merits little discussion. According to Pollen, credible evidence presented at his sentencing hearing demonstrated that the IRS applied the receiver's payments to reduce the total amount, including tax, penalty, and interest, owed for each year, rather than only each year's actual tax liability.[26] Had these payments been allocated only to delinquent taxes, exclusive of penalties and interest, Pollen asserts that he would now owe slightly less than $100,000 in taxes. In Pollen's view, because the Sentencing Guidelines only take into account the actual amount of tax owed, regardless of the interest

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26. The IRS followed its standard procedure of applying payments against the total amount due from the taxpayer, including tax, interest, and penalty, year by year, beginning with the earliest year for which an amount is owed.

and penalties also due to the IRS, *see* U.S.S.G. § 2T1.1 (Commentary, Application Note 2),[27] the district court's failure to recalculate his taxes owed in this manner is clear error: in effect he has received a longer sentence as a consequence of the receiver's failure to request that the IRS depart from its standard procedure for allocating tax payments.[28]

We cannot adjudge the district court's calculation of the tax owed is clearly erroneous. The Sentencing Guidelines provide that sentences imposed for violations of section 7201 are to be based on "the total amount of tax that the taxpayer evaded or *attempted to evade*." U.S.S.G § 2T1.1(a) (emphasis added). A preponderance of the evidence presented at the sentencing hearing demonstrated that Pollen attempted to evade every penny of the taxes he owed. Consequently, the district court would not have committed clear error even if it had sentenced Pollen based on the full tax debt he attempted to evade, without any credit for the receiver's payments to the IRS It is thus not clearly erroneous for the district court to

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27. Guideline 2T4.1, the Tax Table, provides that a defendant owing more than $70,000 but less than $120,000 in tax is to receive an offense level of 12. A defendant owing more than $350,000 but less than $500,000 is to receive an offense level of 15.

28. We do not reach Pollen's additional arguments that the district court's decision to adopt the government's calculation of the amount of taxes owed was clearly erroneous because the IRS failed to assign a basis figure to certain properties sold by the receiver, and because taxes due for 1983, charged in Court Four of the indictment and later dismissed, were improperly included in the total figure. Even assuming that these decisions were in error, they would be harmless. The total amount disputed by Pollen in this regard is $89,725.50, while an offense level of 15 is appropriate if the amount of tax evaded is more than $350,000 but less than $500,000. The amount of tax evaded by Pollen would nevertheless fall within this range even if the $89,725.50 at issue in these arguments is subtracted from the total amount found by the district court.

refuse to accept Pollen's calculation of the amount of taxes owed, a calculation that assumes that the IRS should have allocated the payments made by the receiver in a manner more favorable to Pollen.[29]

V.

Finally, Pollen argues that by imposing consecutive sentences for his pre-Guidelines and Guidelines counts, the district court abused its discretion by double-counting all of the taxes he owed for the tax years in question. Emphasizing the fact that the statutory maximum penalty for a violation of 26 U.S.C. § 7201 is five years (60 months), Pollen asserts that, even assuming that the calculation of a sentence range of 57-71 months is correct, if all of the counts charged had been governed by the Guidelines, a consecutive sentence of at most eleven months would have been permissible.[30]

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29. We pause to accept the Sentencing Commission's longstanding invitation to express our view on the efficacy and propriety of particular Guidelines. *See, e.g., United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992). Guideline section 2T1.1, Application Note 2, provides that for the purposes of imposing sentence for violations of section 7201, the tax loss considered cannot include interest or penalties. *See* U.S.S.G. § 2T1.1. While such a limitation may be appropriate in an evasion of assessment case, it is not always so when imposing sentence for tax evasion committed through the evasion of payment.

Pollen's actions aptly illustrate this point: his repeated atttempts to conceal assets were intended to evade the payment of his total debt of over $3,000,000. The Guidelines' requirement that his sentence be calculated based on only his evasion of the $488,000 in raw taxes owed, and not also on his evasion of the payment of interest and penalties, fails to reflect accurately the criminal behavior involved in this type of evasion ofpayment of taxes offense.

30. In relevant part, Guideline section 5G1.2 states:

(Cont'd)

In Pollen's view, the district court abused its discretion through not imposing a consecutive sentence of a comparable length for his pre-Guidelines counts.

It is well settled that, with regard to pre-Guideline counts, "the district court has virtually unfettered discretion in imposing a sentence if it falls within the statutory limits." *United States v. Matthews*, 773 F.2d 48, 53 (3d Cir. 1985). In keeping with this discretion, our review of such a sentence is extremely circumscribed: if the sentence falls within the statutory maximum it is not reviewable on appeal unless there is a showing of illegality or abuse of discretion. *United States v. Fischback & Moore, Inc.*, 750 F.2d 1183, 1188 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029, 105 S. Ct. 1397, 84 L.Ed.2d 785 (1985).

With regard to offenses committed before the effective date of

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(Cont'd)

> (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.
>
> (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law. . . .

U.S.S.G. § 5G1.2.

the Sentencing Guidelines but sentenced after that date, we have stated that "the preexisting law will apply to all substantive matters including the imposable sentence." *United States v. Sussman*, 900 F.2d 22, 24 (3d Cir. 1990) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3372). Further, the fact that a defendant is also convicted of Guidelines offenses does not affect a sentencing court's discretion in sentencing on the pre-Guidelines counts. *Accord United States v. Lincoln*, 925 F.2d 255, 257 (8th Cir.) ("it is not an abuse of discretion to impose consecutive sentences when a defendant stands convicted of related pre-Guidelines and Guidelines offenses – even if the Guidelines would mandate concurrent sentences if both offenses were subject to them"), *cert. denied*, __ U.S.__, 111 S. Ct. 2838, 115 L.Ed.2d 1006 (1991); *United States v. Watford*, 894 F.2d 665 (4th Cir. 1990) (same); *United States v. Garcia*, 903 F.2d 1022 (5th Cir.) (same) *cert. denied*, __ U.S. __, 111 S. Ct. 364, 112 L.Ed.2d 327 (1990). Thus Pollen's assertion that his one Guideline count of tax evasion has some limiting effect on the district court's discretion to impose consecutive sentences for his pre-Guideline counts fails.

VI.

For the foregoing reasons, we will vacate the judgment with respect to Count Five and remand to the district court for further sentencing proceedings in light of this opinion. The district court's sentencing determinations will be affirmed in all other respects.

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5703

UNITED STATES OF AMERICA

Appellee,

v.

WILLIAM POLLEN

Appellant,

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, and LEWIS, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular, active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is hereby denied.

BY THE COURT.

s/ Jane R. Roth
Circuit Judge

DATED: November 10, 1992

## APPENDIX C — TRANSCRIPT OF ORAL OPINION AND SENTENCE OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DELIVERED ON JULY 31, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CRIMINAL NO. 86-110

THE UNITED STATES OF AMERICA

vs.

WILLIAM POLLEN,

Defendant.

UNITED STATES COURTHOUSE
401 MARKET STREET
CAMDEN, NEW JERSEY 08181
July 31, 1991

BEFORE:
THE HONORABLE JOSEPH H. RODRIGUEZ, JUDGE
DISTRICT OF NEW JERSEY

APPEARANCES:
MICHAEL CHERTOFF, UNITED STATES ATTORNEY
BY: ALICIA OLIVERA VALLE, ESQUIRE
AND DAVID FERNANDEZ, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY

NEAL COMER, ESQUIRE
ATTORNEY FOR DEFENDANT

WILLIAM J. RICHARDS, JR., CSR, CM
OFFICIAL U.S. REPORTER

* * *

be right out. I just want to look at a couple of things in the privacy of the robing room.

(Recess taken at 3:25 p.m.)

(Back at 3:45.)

(All present.)

THE CLERK: All rise.

THE COURT: You may be seated.

Counsel, throughout three days obviously I can say that both sides obviously have presented their issues to the best of their ability and counsel has been extremely helpful to the Court. And I do want to express my personal thanks to the attorneys for the professional manner in which they presented themselves and the facts in this case, but obviously it comes to a point where certain determinations have to be made by the Court, and I do intend to make certain findings before we call upon the defendant to make a statement, if he so chooses. But I do want the record to show that I have been reading over the past several days, the many letters that I have received in this case on behalf of some — on behalf of Dr. Pollen, and frankly, some that are not supportive of the defendant in this case, which indicates that there is a variety of opinion in this matter also. But I think we should sort of set the stage somewhat for some of the findings that we have to make here. And I do know that we have heard much discussion about the weight of the evidence that should be considered by the Court and whether or not hearsay evidence should be given the weight that the government suggests.

With respect to hearsay, I think throughout the hearing I've

been indicating that in a sentencing hearing hearsay obviously is permitted, but because it's permitted doesn't necessarily mean that the Court should rely or that should indicate what weight the Court should give the evidence presented through that hearsay method. In this case it's somewhat complicated by the fact that not only do we have what would appear to be hearsay, but we do have what I consider to be certain admissions of co-conspirators which comes in, as we know, as an exception to the hearsay rule. And I've attempted to give that its due weight when I have put it in that category. When statements have come in that would be considered hearsay, one is always concerned as with any hearsay objection, that the malice to hearsay is that it's offered for its truth where the cross examiner cannot reach the maker of the statement in order to test the credibility of the maker of the statement and whether or not the statemerlt or the fact contained in that statement is, therefore, true, which means that everl in a sentencing hearing when the statement such as that comes in, that the credibility has to be somewhat carefully measured. I've attempted to do that by looking through the evidence and seeing where and whenever a statement was made, whether it was sufficiently corroborated by other documents and so that we don't just take it, a brief, at its face value. If I can give one example, obviously it did come to my attention the debate over whether or not the defendant was in possession or owned a certain boat. Statements came in with respect to that item, and I find that the article that was indicated by the statement throughout the rest of the evidence became trimmed with sufficient documents to create the legitimate inferences that in fact those statements tended more to be credible than noncredible, and I've attempted to make those judgments. And I point to the basis of the boat because then we do have the Doctor's own hand in a letter indicating that he's the owner of the boat. Now, it's true that he could have many motives in stating that, but in the nature of the record before us, I think one has to look at them in uncontradicted and unrefuted and give the total records the legitimate inference

that in fact it deserves. So with corrohoration and legitimate inference, and admissions of co-conspirators, I feel that the facts that I'm about to state are supported in the record, certainly sufficient to support the findings during a sentencing hearing.

And if I may start this way, that with respect to the obstruction of justice, I'll handle them in the order in which they were argued, that there the defense concedes that the two point determination is, is appropriate. The government obviously argues for more, and I think here that the Court will accept the concession of the defendant and indicate that the two points for the obstruction of justice is certainly appropriate. I think in looking at that concession, it's basically a guide line application, that we do have to bear in mind that what we heard from agent Palka and agent Lombardi, did indicate that we had a rather, a sophisticated method of operation through here, the secret accounts and the assets that apparently were in unreachable places, false identifications, the prior fleeing; that, in all, is certainly sufficient to support the obstruction of justice or the obstruction, and to yield the concession for the two points.

I think also with respect to specific offense characteristics, there again, there is no dispute, and in fact it's conceded and certainly appropriately so under section 2T1.1(b)(2), of the sentencing guidelines that requires a two level increase if sophisticated means were used to impede discovery of the nature or extent of the offense. And I think here obviously the record does speak to that level of sophistication. So the two points there as conceded are appropriate, so that obviously they will be determined in that order.

As far as the adjustment for acceptance of responsibility, here the, you know, notwithstanding that there were certain admissions

placed on the record during the Rule 11 proceeding, it's my judgment that the defendant should not be granted the two level reduction under section 3E1.1 under acceptance of responsibility. I think the fact that he became a fugitive of the instant prosecution, and remained at large until August of 1990, this contradicts application note 1A of section 3E1.1 regarding voluntary termination of criminal conduct, and during the fugitive status of the defendant according to the record before us, continued to secrete his, his assets. His flight from prosecution is contrary to the prompt surrender criteria cited in application note 1D of section 3E1.1 of the guidelines, and right there, that would be sufficient to say that the reduction for acceptance of responsibility would not be appropriate. And the history in this matter clearly portrays that the defendant had no intention of repaying any portion of his tax obligation during the investigation by the IRS during his fugitive years. Obviously, the defendant has not voluntarily assisted authorities in the recovery of any of the secreted assets; that's contrary to application of note 1E of section 3E1.1. And also application note 4 instructs that an enhancement under section 3(c) 1.1, the obstruction, ordinarily indicates that the defendant has not accepted responsibility. And I think clearly the application of the guidelines would dictate that a two point reduction would not be appropriate in this case.

Next matter that, to be determined for the application of the guidelines is whether the role — whether there was a leadership role played by the defendant. In here, based on the evidence that I've heard, I certainly feel that it's appropriate to adopt the portrayal of the evidence and as also outlined in paragraphs 44 and 45 in the presentence report. In my judgment, there is a certainly a preponderance of the evidence that indicates that there was the involvement of Valerie Garrett and Carlos Garrett, Barry Feldman, Charles Kemler, and Irwin Rashbaum; let alone we also have the

implication of Mr. Golub and David Young. But in looking at the whether or not there are five, the guidelines clearly say that the five don't have to know who one another — who they are, and they don't have to be orchestrated into one singular act. What's importarlt is whether or not they knew of an attempt to evade and were they orchestrated by the defendant. think the evidence clearly shows that these people would not have been where they were for the purpose of attempting to retrieve secreted items unless in fact they were, as the government contends, orchestrated by the defendant. And obviously hearing from the Garrett's themselves, they knew the purpose of their, their trips. So I think if we look, again, at the evidence I should make it clear that in this type of a hearing the standard is not beyond a reasonable doubt as if we conducted a trial on the guilt or innocence of the defendant, but whether the Court is reasonably satisfied that sufficient facts exist to give weight to the allegations as made by the government or as to a finding of a fact. And I think here the evidence presented by the government is overwhelming with respect to the activities of parties and the role that was being played from a distance in this regard by the defendant.

That being the case, under adjustment for the role in the offense and in keeping again as I say with the evidence as I understand it, clear recitation of paragraphs 44 and 45 of the presentence report, I do find that the plus four scoring is appropriate in this case.

What we're then left with is an effort to determine the amount of tax, of the taxes evaded. And here admittedly there was much testimony presented with respect to that issue. The government has placed in evidence that there is a total amount due which includes penalties and interest of $3,095,462.96, but for my purposes and for the application of the guidelines, we have to concentrate on the

amount of tax evaded and the amount of tax evaded to then be applied to the table that appears at 2T4.1 tax table. And that tax table includes the additional scoring that's to be added to the calculation, depending on the amount of money that's determined to be the amount of tax evaded. The defense argues that there's something slightly less than 100,000 that's involved and the government has presented evidence that $488,072.73 is the amount evaded. If one were to look strictly at the evidence presented in this case, and weighing where if you had to choose one figure or the other without coming down and making an independent calculation, I think the overwhelming proof indicates, supports the government's position that the figure is in the neighborhood of $488,072.73 for many reasons. Obviously, facts presented as to whether or not the defendant was attempting to pay his taxes, what role the receiver played and whether any of this exonerated or excused or whether, whether it would adjust the figures in a different manner; obviously, the experts that testified for the defendant had to concede that, there were certain or there were certain information that, they were not aware of. We do have the government making its presentation and stating in a sense the challenge as to how they arrived at the figures that they were calculating and placed them to the best of their ability in evidence with the supporting documents as I say not simply to make the statement, but then to trim it with documents and certain circumstances to give it more credibility with respect to the finding that a court can rely upon in making its judgment.

But in finding where I feel the appropriate range is, let me say that if it's more than 350,000 but less than 500,000 we have a score of what would amount to a 15. Now, I do find from the evidence, and this is not to determine the tax liability of the defendant obviously, but the finding for the purpose of the scoring, that the position taken by the government as supported by their documents

does indicate that a $488,000 figure is certainly sufficiently sustainable. If we were to cut over 100,000 from that figure, we're still at 2T4.1, which is more than 350,000, which leads to a score, a weighted score of 15. So what I'm indicating is for the purpose of the scoring under the guidelines, 488,000 becomes somewhat academic because even if we do give certain credits and move to 300, a little more than 350,000 we would still be at the 15. And I do find that the 15 is the appropriate figure in this case and not utilizing a higher figure from some of the earlier calculations of over 500,000 that we had heard earlier. But I do believe that the 15 is appropriate in this case.

That being the case, we have what now would be determined to be a base offense level of 15 in that it' s more than 350, 000, with the specific of fense characteristics of two being conceded, the finding that, for the adjustment for the role in the offense of being a plus four, the adjustment for obstruction of justice which in fact has been conceded, which is a plus two, we are left with now a total offense level of 23. The 23 as combined with a criminal history category score, but because of the prior criminal involvements yields a three at an adjusted offense level of 23 and criminal history category of 23 and a criminal history category of three, the guide line range is 57 to 60 months according to the guidelines — 57 to 71 months. So if we were to apply the guidelines as stated, the range would be 57 to 71 months. The 60 as originally stated is due to the fact that we are limited here by the statutory maximum that controls the guideline count of this case.

Now that we've made those determinations and the basis upon which this Court will make its judgment, Mr. Comer, is there anything beyond that which you've already stated that you'd like to place on the record?

MR. COMER: May I have one moment, Judge?

THE COURT: Yes.

(Conference between defendant and his counsel.)

MR. COMER: Your Honor, I think that I have expressed all, all of our points both technical and otherwise to the Court and I really don't have more to add. I think Dr. Pollen would like to address the Court for a brief moment, if he might.

THE COURT: All right. He certainly may. Dr. Pollen?

THE DEFENDANT: I don't have much to say, just that I regret most of the effect this will have to my family, and I'm an old man; it doesn't make too much difference to me, but I do regret the trouble I've caused by my actions. Thank you.

THE COURT: Does the government have anything now with respect to the findings that have been made on sentencing beyond that which has already been stated?

MS. VALLE: No, your Honor.

THE COURT: Well, obviously the most difficult part, and again I say this many times, that a court has is to impose what it believes to be an appropriate sentence and certainly one which has as its basis the removal of the liberty of another individual. I think the facts here certainly have been stated beyond — you know, within the last three days and I feel that under all the circumstances, that the following sentence is appropriate and it is as follows: It's obvious here that what we're dealing with, we're dealing with a guideline count and then with non-guideline counts so that the

sentencing would have to reflect appropriately the counts and the type of sentence imposed under the law.

So as to Count five of the Superseding indictment, which is the guideline count, and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, William Pollen, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of five years, with continuous jail credit since August 15, 1990.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term of supervised release only begins after release from the terms of imprisonment on counts one, two, three and five as required by Title 18 of the United States Code, section 3583. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released. While on supervised release, the defendant shall not commit another federal, state or local crime; shall comply with the standard conditions of supervision that have been adopted by this Court, and shall comply with the following additional conditions:

One, the defendant shall pay a fine and special assessments that remain unpaid at the commencement of the term of supervised release.

Two, the defendant is to pay all taxes, interest, and penalties due for tax years 1967, 1968, 1970, 1972 through 1975, and 1982. The defendant shall timely file all future tax returns that come due during the period of supervised release; said returns must report all taxable income. Upon request, the defendant shall furnish to the Internal Revenue Service and/or the probation office, any information pertaining to assets, liabilities or income.

*Appendix C*

Any travel beyond the contiguous 48 states is forbidden until the fine, special assessments and outstanding tax obligation arising from the calendar years 1967, 1968, 1970, 1972 to '75, and 1982 have been paid in full. Travel within the contiguous 48 states and foreign travel, once allowed, will be under the discretion of the prohation office.

During the term of supervised release, the defendant shall not seek to obtain, possess or use a passport or form of identification bearing any other name than William Arnold Pollen, birth date of 9/18/23 and Social Security number of 147-16-2302.

And it's further ordered that on Count five, that the defendant shall pay to the United States the fine of $75,000.

Now, with respect to counts one, two and three, the Sentencing Reform Act of 1984 is not applicable and the following sentences are imposed under prior law: It is a adjudged that on counts one, two and three of the Superseding Indictment that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of five years on each count, said terms are to run concurrently to each other, and consecutive to the imprisonment term imposed under Count five.

It is further ordered that the defendant shall pay to the United States a special assessment of $50 on hoth counts three, and five. The collective sanction is ten years imprisonment, three years supervised release, $75,000 fine and $100 in special assessment.

The term of imprisonment is comprised of a five year term with no parole eligibility, and three five year terms concurrent, to each other, but consecutive to Count five fashioning a total

imprisonment sanction in this matter, also complicated by the need to employ two different, Sentencing Acts, besides the atypical nature of the instant offense. The four counts of conviction involve conduct regarding the invasion and payment of secreting assets as opposed to under reporting of income. The aggravating factor discussed in paragraph 95 of the presentence report and specifically the value of the secreted assets dwarfing the amount of taxes evaded, possesses legitimacy. The Court holds that more than two point five million and less than five million of assets have been attempted or intentionally secreted by the defendant to evade payment of taxes, and this is a conservative estimate in light of the gold transfers described in paragraph 27 of the presentence report, the evidence adduced here at trial, the assets, purchases, the expenditures provided for in paragraph 28 and 29, as also supported by the evidence presented during these three day hearings, the assets seized from the safety deposit boxes as explained by the evidence and in paragraph 33 of the presentence report, as well as the financial data deciphered from the seized hand held computer. The preponderance of evidence certainly shows that defendant was in control of the assets. The five year term imposed on Count five complies with the guideline range determined for that count. The three five year terms that run consecutive to Count five in my judgment are justified for the following reasons, which are not adequately addressed by the offense level calculated with Count five: One, I think we must give serious consideration to the magnitude of the assets secreted by this defendant. Two, the two level enhancement for obstruction fails to adequately portray the defendant's intentional obstruction during the investigation of this tax matter as well as his long prolonged elopement, the disdain and arrogance shown by the defendant towards our tax laws over such a considerable period of time dating from before 1965, the first year that under reporting of income resulted in a criminal prosecution. Exactly when the defendant will be released on counts one, two and three will be decided by the Parole Commission.

*Appendix C*

Besides the reasons previously stated, the aggregate ten year term also provides for proportionality to the sentence imposed in 1974 and '75 in this district, by accounting for the defendant's recidivistic nature. Over a decade and a half ago, he was involved with this same type of a situation. Throughout the time he's remained uncooperative, demonstrating certainly an intent not to pay, and to evade the same income and the same taxes. The three year supervised release term is appropriate to monitor the defendant's assimulation into the community and resolve the fine and tax obligation also addressed by this judgment.

Employing other counts of conviction to elongate the period of supervision has been intentionally discarded. The intent is for the defendant to satisfy his fiscal responsibilities timely. Special conditions limiting travel and prohibiting false identification is, false identification related documents, of an obvious basis. They serve as tools to limit the defendant's mobility until he addresses certain responsibilities as well as an attempt to prevent future instances of elopement. The special condition addressing repayment of tax obligations does not cite tax year 1983. Tax obligations arising from this year are addressed by unadjudicated Count four. In light of the *Hughey versus United States* decision and no mention of repayment in the plea agreement, restitution as to Count four cannot be included in this judgment. This does not preclude the IRS from civil collection efforts. Since one condition of the supervised release term is the payment of all outstanding taxes owed for the calendar years encompassed by Count five, the minimum of the guideline range becomes $10,000 as per section 5V1.2C(l)(b). This guideline section directs a full restitution is ordered. The minimum of the guideline range is determined by the fine table under section 5E1.2C(3). Hence, the $75,000 fine is within the prescribed guideline range, takes into consideration the defendant's reported assets, should not impair the satisfaction of his tax obligations and portrays the seriousness of the instant

offense. By not instructing otherwise, the Court intends interest should be levied on this fine.

Now, I recognize much has been said here in what I consider to be in a brief manner in attempting to justify the sentence that has been imposed, but I think very frankly, as we view the evidence and the record in this case, over the past three days, and as we attempt to reconstruct what has occurred over the past decade and a half, I think we do have to underscore that there's a disdain and an arrogance that is certainly unjustified. The letters that I have received all point to the fact that this defendant is a skilled surgeon, he's helped many people and I know that there are some present in this courtroom who have been pleading for mercy for this defendant. On balance, I think what comes through very clearly is that doctors in the medical profession certainly are privileged in that because of their learning, their skill and their knowledge of the ability to gain substantial legitimate income. But doctors have no sacred right to amass a fortune, then ignore their responsibility to society. They not only hurt the patients that they were treating, but more broadly they hurt an entire society that's attempting to pay its fair share in very difficult economic times. And in brief, counsel, that's the judgment of the Court.

I do want to state that because certain findings have been made with respect to facts, and because certain applications, guideline applications have been made, that the defendant has a right to appeal the judgment if he feels the facts have been inappropriately found or that the guidelines have not be appropriately followed. Now, Miss Valle, with respect to counts four, six, seven and eight?

MS. VALLE: Your Honor, pursuant to the plea agreement entered into between the United States and the defendant, the United States at this point would move to dismiss counts four, six,

seven and eight of criminal Indictment number 86-110 as well as Count one of Indictment 90-400 with prejudice.

THE COURT: Those counts will be dismissed and obviously the defendant is in custody and he'll be remanded to the custody of the Marshalls to begin serving his sentence as announced today. Thank you, counsel.

MS. VALLE: Thank you, your Honor.

MR. COMER: Thank you, your Honor.

(Whereupon the matter was concluded for the day.)

* * *

*Appendix C*

CERTIFICATE

I, WILLIAM J. RICHARDS, JR., Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.

s/ William J. Richards, Jr.
William J. Richards, Jr., CSR, CM
Official U.S. Reporter
N.J. Certificate No. XI00673

DATE: 11-20-91

## APPENDIX D — JUDGMENT AND PROBATION/ COMMITMENT ORDER OF UNITED STATES DISTRICT COURT, FILED ON AUGUST 5, 1991

UNITED STATES DISTRICT COURT FOR
DISTRICT OF NEW JERSEY

DOCKET NO.: *CR. 86-110*

DEFENDANT: *WILLIAM POLLEN*

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: *July 31, 1991*

WITH COUNSEL: *Neal S. Comer, Esq.*

PLEA:

*GUILTY*, and the court being satisfied that there is a factual basis for the plea.

FINDING & JUDGMENT:

Defendant has been convicted as charged of the offense(s) of:
*Income tax evasion - 26 USC 7201 - Counts 1, 2, and 3*

SENTENCE OR PROBATION ORDER/
SPECIAL CONDITIONS OF PROBATION:

*On Counts 1, 2, and 3 of the Superseding Indictment*

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for

*Appendix D*

imprisonment for a period of *five (5) years on each count, said terms are to run concurrently to each other and consecutively to the imprisonment term imposed under Count 5 of the Superseding Indictment (Guideline Count).*

*IT IS FURTHER ORDERED that the deft. pay to the United States a special assessment of $50.00 on Count 3.*

*IT IS FURTHER ORDERED that Count 4 of the Superseding Indictment as well as the original indictment is hereby dismissed on application of the government.*

[stamped]
ENTER
on
THE DOCKET
on 8:25 1991
WILLIAM T. WALSH
By s/ illegible

s/ Joseph H. Rodriguez
HON. JOSEPH H. RODRIGUEZ, U.S.D.J. Date: Aug. 2, 1991

*Appendix D*

UNITED STATES DISTRICT COURT
District of *New Jersey*

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: *CR. 86-110 (JHR)*

Defendant's Attorney: *Neal S. Comer, Esq.*

UNITED STATES OF AMERICA

V.

*WILLIAM POLLEN*

THE DEFENDANT:
pleaded guilty to count(s): *5 of the Superseding Indictment*

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s): |
|---|---|---|---|
| *26 USC 7201* | *Income Tax Evasion* | *8/22/90* | *5* |

The defendant is sentenced as provided in pages 2 through *6* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count *6, 7 & 8 of the Superseding/Indictment as well as the original indictment* are dismissed on the motion of the United States.

*Appendix D*

It is ordered that the defendant shall pay a special assessment of $*50.00*, for count *5*, which shall be due immediately. .

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *147-16-2302*

Defendant's Date of Birth: *9/18/23*

Date of Imposition of Sentence: *July 31, 1991*

Defendant's Mailing Address:
*Federal Correctional Facility*
*Fairton, N.J.*

s/ Joseph H. Rodriguez
Signature of Judicial Officer

HON. JOSEPH H. RODRIGUEZ, U.S.D.J.
Name & Title of Judicial Officer.

Date: August 2, 1991

*Appendix D*

Defendant: *WILLIAM POLLEN* Judgment — Page *2* of *6*

Case Number: *Cr. 86-110*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *sixty (60) months.*

The court makes the following recommendations to the Bureau of Prisons: *continuous jail credit since August 15, 1990.*

The defendant is remanded to the custody of the United States marshal.

* * *

*Appendix D*

Defendant: *WILLIAM POLLEN* Judgment — Page *3* of *6*

Case Number: *Cr. 86-110*

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *three (3) years. This term of supervised release only begins after release from the terms of imprisonment on Counts 1, 2, 3 and 5, as required by 18 USC 3583.*

* * *

The defendant shall report in person to the probation office in the district of which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines *and special assessments* that remain unpaid at the commencement of the term of supervised release.

*See Page 4 of Judgment & Commitment Order for Special Conditions.*

* * *

*Appendix D*

Defendant: *WILLIAM POLLEN* Judgment — Page *4* of *6*

Case Number: *Cr. 86-110*

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The deft. is to pay all taxes, interest, and penalties due for tax years 1967, 1968, 1970, 1972 through 1975, and 1982. The deft. shall timely file all future tax returns that come due during the period of supervised release, said returns must report all taxable income. Upon request, the deft. shall furnish to the Internal Revenue Service and/or the Probation Office any information pertaining to assets, liabilities, or income.

Any travel beyond the contiguous forty-eight states is forbidden until the fine, special assessments and outstanding tax obligation arising from the calendar years 1967, 1968, 1970, 1972 through 1975, and 1982 have been paid in full. Travel within the contiguous forty-eight states and foreign travel, once allowed, will be under the discretion of the Probation Office.

During the term of supervised release, the deft. shall not seek to obtain, possess, or use a passport or form of identification bearing any other name than William Arnold Pollen, birth date of 9/18/23, and social security number of 147-16-2302.

*Appendix D*

Defendant: *WILLIAM POLLEN* Judgment — Page *5* of *6*

Case Number: *Cr. 86-110*

FINE

The defendant shall pay a fine of $*75,000.00*. The fine includes any costs of incarceration and/or supervision.

* * *

This fine plus any interest required shall be paid:
In full immediately.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 USC § 3614

*Appendix D*

Defendant: *WILLIAM POLLEN* Judgment — Page *6* of *6*

Case Number: *Cr. 86-110*

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: *Note that the enhancement as a leader of criminal activity of five or more participants; that the deft. did obstruct the administration of justice; and that the deft. has not accepted responsibility are all appropriately noted in the presentence report and the related guideline applications are correct.*

Guideline Range Determined by the Court:

Total Offense Level: *23 - reflects revised figure of total taxes evaded as $488,072.73*

Criminal History Category: *Unchanged*

Imprisonment Range: *57* to *60* months - *constricted by statutory maximum exposure*

Supervised Release Range: - to - years *Unchanged*

Fine Range: *$10,000* to *976,145.46 - reflects full restitution for counts of conviction*

Restitution: *$452,729.73 tax, plus interest/penalties - reflects full restitution on counts of conviction*

The sentence is within the guideline range, that range exceeds

*Appendix D*

24 months, and the sentence is imposed for the following reasons: *for the lone guideline count (Count 5) - maximum statutory sentence and top of guidline range imposed due to the value of secreted assets dwarfing the total taxes evaded.*

*NOTE: Five (5) year consecutive terms imposed on three non-guideline counts for the following reasons: (1) total value of assets hidden from IRS dwarfs taxes evaded; (2) the acts of obstruction towards the administration of justice, especially the elopement, are not adequately addressed in guideline application on Count 5; (3) disdain shown to tax laws and his obligations; (4) need for proportionality to sentences imposed in 1974 and 1975, addressing the defendant's recidivistic history.*

## APPENDIX E — SUPERSEDING INDICTMENT FILED ON OCTOBER 1, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 86-110 (JHR)

26 U.S.C. § 7201;
18 U.S.C. §§ 1028(a)(4),
1028(a)(3), 1542 and 2.

UNITED STATES OF AMERICA

v.

WILLIAM POLLEN

SUPERSEDING INDICTMENT

The Grand Jury for the District of New Jersey, sitting at Newark, charges:

COUNT 1

On or about April 18, 1984, in the District of New Jersey, the defendant

WILLIAM POLLEN,

an orthopedic surgeon and a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1967, 1970, 1972 through 1975, and 1982, in an amount in excess of $400,000.00, by placing

*Appendix E*

part of his assets out of the reach of the United States Government by causing approximately $690,000.00 in gold to be brought to the Swiss Bank Corporation, Toronto, Canada, with instructions to further transfer the gold to a nominee account at the Swiss Bank Corporation, Zug, Switzerland, instead of delivering said funds to the District Director of the Internal Revenue Service in Newark, New Jersey.

In violation of Title 26, United States Code, Section 7201.

*Appendix E*

COUNT 2

On or about June 12, 1984, in the District of New Jersey, the defendant

WILLIAM POLLEN,

a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1967, 1970, 1972 through 1975, and 1982, in an amount in excess of $400,000.00, by placing part of his assets out of the reach of the United States Government by causing approximately $285,000.00 in gold to be brought to the Swiss Bank Corporation, Toronto, Canada, with instructions to further transfer the gold to a nominee account at the Swiss Bank Corporation, Zug, Switzerland, instead of delivering said funds to the District Director of the Internal Revenue Service in Newark, New Jersey.

In violation of Title 26, United States Code, Section 7201.

*Appendix E*

COUNT 3

Between on or about October 5, 1981 and on or about December 18, 1984, in the District of New Jersey, the defendant

WILLIAM POLLEN

a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1967, 1970, 1972 through 1975, and 1982, in an amount in excess of $400,000.00, by engaging in a continuous scheme and course of conduct to conceal his assets. This course of conduct included the use of currency, money orders and cashier's checks in the acquisition of assets and the payment of living expenses, and the use of nominees to conceal said expenditures. These expenditures included trips to Montserrat, South Hampton, England (via Queen Elizabeth II), Venice, Palermo and Rome; the purchase of a 1971 Rolls Royce and a 1983 Lincoln Town Car; and extensive swimming pool repairs and landscaping work performed at his residence in Colonia, New Jersey. In one instance, he used a nominee to purchase a waterfront building lot for $207,500.00 in a development called Sailfish Point in Stuart, Florida.

In violation of Title 26, United States Code, Section 7201.

*Appendix E*

COUNT 4

On or about July 11, 1984, in the District of New Jersey, the defendant

WILLIAM POLLEN,

a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar year 1983, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service, wherein he stated that his taxable income for that calendar year was the sum of $26,389.00 and that the amount of tax due and owing thereon was the sum of $6,557 . 00, whereas as he then and there well knew and believed, his taxable income for that calendar year was the sum of $114,066.45, upon which taxable income there was owing to the United States of America an income tax of $49,034.00.

The sources of the unreported income included the sale of accounts receivable from his medical practice to two separate factors and medical receipts, most of which were deposited to a separate bank account.

In violation of Title 26, United States Code, Section 7201.

*Appendix E*

COUNT 5

On or about August 22, 1990, in the District of New Jersey, the defendant

WILLIAM POLLEN,

a resident of Colonia, New Jersey, did knowingly and wilfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1967, 1970, 1972 through 1975, and 1982, in an amount in excess of $400,000.00, by placing part of his assets out of the reach of the United States Government by maintaining more than $350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at the First Union National Bank of North Carolina in a fictitious name, instead of delivering said funds to the District Director of the Internal Revenue Service in Newark, New Jersey.

In violation of Title 26, United States Code, Section 7201.

*Appendix E*

COUNT 6

On or about August 15, 1990, in Iselin, in the District of New Jersey, the defendant

WILLIAM POLLEN

did knowingly and wilfully possess, with the intent to use so as to defraud the United States, four identification documents and falseidentification documents, that is, United States Passport No. 041958323, in the name George Travers; United States Passport No. 090633765, in the name Buford Allen Carver; United States Passport No. 100424006, in the name Claude Wesley Webster; and United States Passport No. 082027506, in the name Worthington Dudley, all issued by and under the authority of the United States.

In violation of Title 18, United States Code, Sections 1028(a)(4) and 2.

*Appendix E*

COUNT 7

On or about August 15, 1990, in Iselin, in the District of New Jersey, the defendant

WILLIAM POLLEN

did knowingly and wilfully possess with intent to use unlawfully the following identification documents and false identification documents (other than those issued lawfully for the use of the possessor):

New Jersey Driver's License No. W2087-12886-10354, in the name of Claude W. Webster;

New Jersey Driver's License No. C0712-10361-06332, in the name of Buford Allen Carver;

Pennsylvania Driver's License No. 22-196638, in the name of Luigi Somma;

Maine Driver's License No. 5710201, in the name of Worthington Dudley;

Social Security Card No. 144242208, in the name of Richard G. Phillips;

Social Security Card No. 249247870, in the name of Bill Worthington Dudley;

*Appendix E*

City of Elizabeth, New Jersey, Birth Certificate, issued September 26, 1984, in the name of Richard Phillips;

Venezuelan Driver's License No. 039451, in the name of Worthington Dudley; and 8

Venezuelan Driver's License No. 144242208, in the name of Richard G. Phillips;

possession of which documents was in and affected interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 1028(a)(3) and 2.

*Appendix E*

COUNT 8

Between on or about December 24, 1987 and February 29, 1988, at Toms River, in the District of New Jersey, the defendant

WILLIAM POLLEN

did knowingly and wilfully make a false statement by identifying himself as Buford Allen Carver in a passport application with the intent to induce and secure for his own use the issuance of a passport under the authority of the United States, contrary to the laws regulating the issuance of passports.

In violation of Title 18, United States Code, Sections 1542 and 2.

A TRUE BILL

s/illegible
FOREPERSON

s/MICHAEL CHERTOFF
United States Attorney

Supreme Court, U.S.
FILED
APR 15 1993

No. 92-1331

# In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM POLLEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
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## QUESTIONS PRESENTED

1. Whether the court of appeals properly determined that distinct acts of tax evasion may constitute separate offenses under 26 U.S.C. 7201.

2. Whether the district court impermissibly sentenced petitioner to consecutive sentences.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-1331

WILLIAM POLLEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-30a) is reported at 978 F.2d 78.

### JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. A petition for rehearing was denied on November 10, 1992. The petition for a writ of certiorari was filed on February 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a plea of guilty in the United States District Court for the District of New Jersey, petitioner was convicted on four counts of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201. The four counts charged petitioner with willfully attempting to evade payment of income taxes for the taxable years 1967, 1970, 1972-1975, and 1982. Pet. App. 5a.

1. Petitioner's guilty plea in this case was "not the first chapter in the saga of [petitioner's] attempts to evade his obligation to pay personal income taxes to the United States government." Pet. App. 3a. Petitioner, a medical doctor, was indicted in April 1972 on three counts of income tax evasion for the years 1965, 1966, and 1967. The charges stemmed from an Internal Revenue Service investigation revealing that between 1965 and 1967 petitioner deposited $650,000 in a New Jersey bank without reporting to the IRS any income relating to the deposits. *Ibid.*

Before petitioner was arraigned on those charges, he fled. After a bench warrant was issued for his arrest, he was apprehended in Canada. In March 1973, he pleaded guilty to evading $146,987 in taxes due for 1967. He then failed to appear for sentencing, and another bench warrant was issued for his arrest. Petitioner evaded custody until May 7, 1974. After his apprehension, petitioner was sentenced to a five-year term of imprisonment. Pet. App. 3a.

Meanwhile, in response to a petition filed by the IRS, the district court appointed a receiver for petitioner's estate, with instructions to take custody of all property belonging to petitioner and his wife and to satisfy petitioner's tax liens for calendar years 1965-1967. The receiver remained in place from 1972 through 1978. Throughout that period, petitioner continued to conceal substantial assets located outside the United States, and

he refused to cooperate with the receiver's efforts. As a result, the district court held petitioner in civil contempt from January 1974 through June 1975. Pet. App. 4a.

During his tenure, the receiver collected approximately $1,300,000. About half of that amount was remitted to the IRS to pay petitioner's tax obligations for 1965 and 1966, and a portion of his taxes due for 1967. Pet. App. 4a.

After petitioner was released from prison in April 1976, he continued to evade payment of his taxes and to conceal assets from the government. Consequently, a grand jury returned a four-count indictment, charging petitioner with willfully attempting to evade and defeat the payment of income taxes for the years 1965 through 1967, 1972 through 1975, and 1980 through 1982, in an amount in excess of $640,000. Petitioner fled again, and he remained a fugitive for more than four years. Pet. App. 5a.

Petitioner was apprehended on August 15, 1990. When he was arrested, petitioner possessed numerous pieces of false identification, including social security cards, passports, driver's licenses, and credit cards. He also had a portable computer that contained information, recorded in at least four different coding systems, detailing his elaborate international system for concealing assets from the IRS. Pet. App. 5a.

2. A superseding eight-count indictment was later returned against petitioner. Pet. App. 5a. The four counts to which petitioner pleaded guilty (Counts 1-3 and 5) charged different attempts to evade the payment of income taxes for seven years—1967, 1970, 1972 through 1975, and 1982. *Ibid.* Count 1 charged that on or about April 18, 1984, petitioner willfully attempted to evade payment of taxes by placing part of his assets out of the reach of the United States government. The indictment

alleged that he caused approximately $690,000 in gold to be delivered to the Swiss Bank Corporation in Toronto, Canada, with instructions to transfer the gold to a nominee account at the Swiss Bank Corporation in Zug, Switzerland. Pet. App. 58a-59a.

Count 2 charged that on or about June 12, 1984, petitioner willfully attempted to evade payment of his income taxes by causing approximately $285,000 in gold to be delivered to the Swiss Bank Corporation in Toronto, Canada, with instructions to transfer the gold to a nominee account at the Swiss Bank Corporation in Zug, Switzerland. Pet. App. 60a.

Count 3 charged that between October 5, 1981, and December 18, 1984, petitioner willfully attempted to evade payment of his income taxes by a continuing course of conduct designed to conceal his assets. That conduct included the use of currency, money orders, and cashier's checks in the acquisition of assets and the payment of living expenses, and the use of nominees to conceal the expenditures. Pet. App. 61a.

Count 5 charged that on or about August 22, 1990, petitioner willfully attempted to evade payment of his income taxes by maintaining in a fictitious name more than $350,000 in gold, platinum, jewelry, and gems in safety deposit boxes at a bank in North Carolina. Pet. App. 63a.

The district court held a three-day sentencing hearing. On Count 5, the only count that was subject to the Sentencing Guidelines, the court sentenced petitioner to 60 months' imprisonment. Petitioner was sentenced to three concurrent five-year terms of imprisonment on Counts 1, 2, and 3. The sentence on those counts was made consecutive to the Guidelines sentence on Count 5. Pet. 5.

3. On appeal, petitioner claimed that the four counts to which he pleaded guilty were multiplicitous. Because

he committed what he claimed was a single violation of 26 U.S.C. 7201, petitioner argued that the multiple punishments he received violated the Double Jeopardy Clause. Pet. App. 2a. In addition, petitioner claimed that the district court erred in making the Guidelines sentence imposed on Count 5 consecutive to the non-Guidelines sentence imposed on Counts 1 through 3. Pet. App. 28a. Petitioner also claimed that the district court erred in increasing his Guidelines offense level by four levels to reflect his role in the offense charged in Count 5. Pet. App. 2a.

The court of appeals rejected petitioner's double jeopardy claim. Since the sentences for Counts 1-3 ran concurrently, the court of appeals examined only whether the acts of evasion charged in those three counts constituted the same offense as the acts of evasion charged in Count 5. Pet. App. 9a n.10, 12a. Looking to the unit of prosecution under 26 U.S.C. 7201, the court held that the discrete acts of evasion charged in the two sets of counts constituted separate offenses, because Section 7201 "evinces the congressional intent to allow distinct, significant, affirmative acts of tax evasion" to constitute separate violations of Section 7201. Pet. App. 15a-16a, 17a n.15.

The court also concluded that in light of the facts of this case, it was especially appropriate to treat distinct acts of evasion as constituting separate offenses. Petitioner made several separate transfers of hundreds of thousands of dollars for the purpose of evading the taxes he owed for all seven years at issue in the indictment. The court pointed out that at the time petitioner engaged in those transactions, he knew that he owed substantial amounts of tax, but that (as petitioner admitted) he did not know the tax years to which each act of evasion applied. Thus, the court concluded that petitioner attempted through his several

affirmative acts to evade payment of all taxes he owed, regardless of the tax years in question. Pet. App. 16a.

The court also rejected petitioner's contention that in imposing consecutive sentences for his pre-Guidelines and Guidelines offenses, the district court double-counted all of the taxes he owed for the tax years in question and thus abused its discretion. Pet. App. 30a. The court of appeals relied upon the settled principle that a sentencing court has broad discretion in choosing a sentence within statutory limits in pre-Guidelines cases. Pet. App. 29a. The court then held that the fact that a defendant is convicted of an offense subject to the Guidelines does not affect the sentencing court's discretion with respect to offenses that are not subject to the Guidelines. Pet. App. 30a.

Finally, the court held that the district court committed plain error in departing upward from the Guidelines sentencing range based on petitioner's leadership role in the offense. Pet. App. 19a-26a. The court of appeals concluded that the district court had failed to focus on petitioner's role with respect to the specific count at issue, and instead had improperly relied on petitioner's role in the overall scheme. The court therefore vacated petitioner's sentence on Count 5 and remanded to the district court for further sentencing proceedings. Pet. App. 24a-25a, 30a. Petitioner was resentenced on December 17, 1992. An appeal from the new sentence is pending in the court of appeals. Pet. 6 n.5.

## ARGUMENT

1. Petitioner contends (Pet. 6-17) that he was improperly subjected to multiple punishments on the four counts to which he pleaded guilty. The court of appeals correctly rejected that claim.[1]

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[1] As petitioner acknowledges (Pet. 6 n.5), this case is an interlocutory posture. In the court of appeals, petitioner's claims went

a. Petitioner's claim is one of multiplicity—he alleges that he was subjected to multiple charges and multiple punishments for conduct that constituted only a single offense. Because he pleaded guilty to all four counts at issue here, petitioner conceded that he committed four distinct offenses. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989) ("a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede[s] that he has committed two separate crimes"). The four counts at issue in this case facially alleged four distinct acts of evasion; Count 5 thus was not "facially duplicative" of the offenses charged in Counts 1-3. See *Broce*, 488 U.S. at 575 (distinguishing *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975)). Petitioner therefore waived his multiplicity claim when he pleaded guilty to four of the offenses charged in the indictment.

Even if petitioner's guilty plea had not effected a waiver of his multiplicity claim, that claim would be without merit in any event. The resolution of a multiplicity claim depends on the unit of prosecution established by Congress in the statute. *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978). Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" is "guilty of a felony." As the court of appeals found, the plain language of Section 7201 "evinces the congressional intent to allow distinct,

only to the lawfulness of his sentence on Count 5. The court of appeals concluded that the district court relied on an erroneous ground in imposing an upward departure and accordingly remanded the case for resentencing on that count. Pet. App. 26a, 30a. Petitioner was resentenced, and his appeal of that sentence remains pending. The petition in this case raises issues solely relating to the lawfulness of petitioner's sentence on Count 5, a sentence that is not yet finally determined.

significant, affirmative acts of tax evasion to constitute separate section 7201 offenses." Pet. App. 15a-16a.

Petitioner argues (Pet. 9) that the offense defined by Section 7201 is "tax evasion" and that the unit of prosecution therefore necessarily turns on each tax obligation that is evaded. That is incorrect. Although "tax evasion" is the familiar shorthand expression for the offense, Section 7201 specifically penalizes any willful attempt to evade tax. *Spies* v. *United States*, 317 U.S. 492, 498-499 (1943). Multiple acts of evasion therefore constitute multiple violations of Section 7201.

Contrary to petitioner's assertion (Pet. 10-11), repeated acts of evasion add to the harm against which Section 7201 is directed. Each time a taxpayer engages in an act of evasion, he increases the likelihood of his success, increases the amount of tax that may ultimately be evaded—even if he is not completely successful, and increases the potential cost of the IRS's enforcement and collection efforts. Thus, repeated, discrete efforts to evade a tax result in an increased likelihood of delinquency and an increased danger to the integrity of the tax system as a whole. The language and purposes of the statute therefore confirm that Congress could not have intended taxpayers to be free to engage in any number of distinct acts of evasion without fear of any incremental penalty as long as all of the acts relate to taxes due in the same tax year.

Basing separate charges on separate acts of evasion is particularly appropriate in a case such as this one, where the defendant owes unpaid taxes for a number of years and the charged acts of evasion occured in widely separated time periods: the acts charged in Counts 1-3 occurred between 1981 and 1984, while the acts charged in Count 5 occured in 1990. As petitioner acknowledges, his various attempts to evade taxes related not to any specific tax year, but to all the taxes he owed, regardless

of the tax year. The court of appeals was therefore correct in rejecting petitioner's con-tention that, when a defendant's acts result in evasion of tax obligations for many years, discrete acts of evasion cannot constitute the appropriate unit of prosecution under Section 7201.[2]

b. The decision in this case does not conflict with any decision of any other court of appeals. Petitioner has cited no case holding that the particular tax obligation that is the object of the evasion is the only appropriate unit of prosecution under Section 7201, and we have found no such case. Although petitioner cites (Pet. 7-8) cases recognizing that a series of acts designed to evade the tax for a particular period can properly be charged as a single violation of Section 7201, those cases do not hold or even suggest that separate and distinct acts constituting attempts to evade taxes for the same period do not also constitute separate offenses under Section 7201. The issue in this case, which the court of appeals referred to as a "unique question," Pet. App. 12a, was not addressed or decided in any of the cases relied upon by petitioner. See *United States* v. *Lennon*, 246 F.2d 24, 27 (2d Cir.), cert. denied, 355 U.S. 836 (1957);[3] *United States* v. *Smith*, 335 F.2d 898, 900-901 (7th Cir.

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[2] Petitioner complains (Pet. 16) that the court of appeals failed to follow the rule of lenity. As the court concluded (Pet. App. 17a n.15), however, "section 7201 is not ambiguous," and there was therefore "no need to resort to the rule of lenity." See *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991).

[3] In *Lennon*, the court rejected the contention "that it was prejudicial error for the trial court to submit to the jury, as single counts for each year in question, the combined issues of understatement of income and of fraudulent exemptions." 246 F.2d at 27. The court of appeals held that filing a false return constituted only one act of evasion, regardless of the number of false statements on the return. *Ibid.* That holding does not speak to the question in this case.

1964), cert. denied, 379 U.S. 989 (1965);[4] *United States* v. *Minker*, 312 F.2d 632 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963).[5]

The decision of the Ninth Circuit in *Cohen* v. *United States*, 297 F.2d 760, cert. denied, 369 U.S. 865 (1962), indicates that the unit of prosecution under Section 7201 need not be limited to the particular tax that the defendant attempts to evade. In that case, the court held that the defendant's conviction for evasion of the payment of taxes did not violate double jeopardy when the defendant had previously been convicted for evasion of assessment of those same taxes. 297 F.2d at 769-771.

c. Finally, the issue in this case has limited practical significance. Under the Sentencing Guidelines, a defendant's sentence will generally be the same regardless of the unit of prosecution under Section 7201. Sentencing

[4] In *Smith*, the Seventh Circuit observed that three tax evasion counts "might be said to pertain to 'a continuing course of illegal conduct,' in the sense that the intention was to avoid taxes so long as payoffs" made to the defendant, a union official, continued, but the court concluded that each count stated a separate offense. 335 F.2d at 900-901. The court stated that "in a criminal tax evasion case each year stands alone, and the failure to pay taxes in each of the years involved constitutes a separate offense." *Id.* at 901. There is nothing inconsistent between that statement and the holding in this case that separate acts of evasion may constitute separate offenses.

[5] In *Minker*, the defendant was convicted of willfully attempting to evade wagering excise taxes. The Third Circuit held that the defendant could be sentenced on separate counts for each month of attempted evasion because each month of attempted evasion constituted a separate offense. The court reasoned that the month was "the unit of time which is the basis for the tax, just as a year is the period for which income taxes are due." 312 F.2d at 636. That statement, while true as far as it goes, does not speak to the question whether multiple, discrete acts of evasion with respect to a tax obligation for a single tax year constitute separate violations of Section 7201.

Guidelines § 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together" when a defendant is charged with multiple counts. Under Sentencing Guidelines § 3D1.2(d), multiple counts of attempted evasion are grouped. See also Sentencing Guidelines § 2T1.1 (Tax Evasion). Once related tax counts have been grouped, the Guidelines sentence is based on the total tax loss, not on the number of separate violations. Thus, for offenses occurring after November 1, 1987, the effective date of the Sentencing Guidelines, the resolution of the unit of prosecution issue in this case will not have any impact on the length of a defendant's sentence.

2. Petitioner contends (Pet. 18-21) that it was improper for the district court to impose consecutive sentences on the pre-Guidelines and Guidelines counts, because "the Guidelines sentence [was] calculated based on the conduct which formed the basis for the pre-Guidelines counts." Pet. 18.

Under the Sentencing Guidelines, petitioner's sentence on Count 5 was based in part on the "tax loss" caused by his crime, which was "the total amount of tax that the taxpayer evaded or attempted to evade." Sentencing Guidelines § 2T1.1(a). As petitioner points out (Pet. 18), the Guidelines require a sentencing court to consider the loss from all acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. Sentencing Guidelines §§ 1B1.3(a)(2), 2T1.1 Application Note 3. Pursuant to Section 1B1.3(a)(2), pre-Guidelines conduct can properly be considered in sentencing a defendant on a Guidelines count. *E.g.*, *United States* v. *Parks*, 924 F.2d 68, 71 (5th Cir. 1991); *United States* v. *Niven*, 952 F.2d 289, 294 (9th Cir. 1991); *United States* v. *Watford*, 894 F.2d 665, 668 n.2 (4th Cir. 1990).

The district court determined, for purposes of calculating petitioner's sentence on Count 5, that the tax loss caused by petitioner's conduct was approximately $488,000. Pet. App. 38a. Petitioner asserts that, because that tax loss resulted in part from conduct that predated the conduct charged in Count 5, the sentence the court imposed on Counts 1-3 must have been based in part on the same tax loss calculation. Relying on two Ninth Circuit cases, *United States* v. *Niven*, 952 F.2d 289 (1991), and *United States* v. *Scarano*, 975 F.2d 580 (1992), petitioner argues that it is improper for a court to impose consecutive sentences for Guidelines and non-Guidelines counts if the sentencing court bases both sentences on the same tax loss. In stating the considerations underlying the sentence it imposed, however, the district court in this case did not suggest that it was basing its sentence on Counts 1-3 on the amount of tax loss caused by the conduct charged in those counts or in Count 5. Rather, the court explained that it was imposing a consecutive sentence on Counts 1-3 because of the magnitude of the assets concealed by petitioner and the "disdain and arrogance shown by [petitioner] towards our tax laws over such a considerable period of time dating from before 1965." Pet. App. 43a. Moreover, there is no evidence that the district court sentenced petitioner on Count 5 based on anything other than the amount of taxes that were due and owing at the time he committed the evasive acts charged in that count, as opposed to the amount of taxes he had evaded over the years. Thus, petitioner has failed to demonstrate that the tax loss forming the basis for the sentence on Count 5 was also considered in sentencing him on Counts 1-3, and there is therefore no basis for

concluding that the double counting of which petitioner complains occurred in this case.[6]

In any event, even if the decision below conflicted with *Niven* and *Scarano*, review by this Court would be unwarranted. Petitioner's claim of a conflict relates only to cases in which a defendant is sentenced for one crime under the Guidelines and for another crime under pre-Guidelines law. Such mixed cases have arisen where some, but not all, of the offenses for which a defendant has been convicted occurred before November 1, 1987, the effective date of the Guidelines. The issue thus affects only a closed and rapidly dwindling set of cases, and therefore does not call for this Court's review.

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[6] Even if the sentencing court had based the non-Guidelines and Guidelines sentences on the same loss figure, we submit that the non-Guidelines sentence could not be challenged on that ground. The Double Jeopardy Clause in the multiple punishment context is concerned only with ensuring that the punishment does not exceed that authorized by the legislature, see *Jones* v. *Thomas*, 491 U.S. 376, 381 (1989). Each count under Section 7201 subjects a defendant to up to five years of imprisonment. An appellate court therefore has no basis for overturning consecutive sentences on pre-Guidelines and Guidelines counts, as long as no sentence on any count of tax evasion exceeds five years and the court has correctly applied the Sentencing Guidelines. *United States* v. *Watford*, 894 F.2d at 669; *United States* v. *Parks*, 924 F.2d at 73; *United States* v. *Garcia*, 903 F.2d 1022, 1024-1026 (5th Cir.), cert. denied, 498 U.S. 948 (1990); *United States* v. *Ewings*, 936 F.2d 903, 910 (7th Cir. 1991); *United States* v. *Lincoln*, 925 F.2d 255, 256-257 (8th Cir.), cert. denied, 111 S. Ct. 2838 (1991). In this case, the court of appeals correctly held that the non-Guidelines sentences were within the statutory limit, and it remanded the Guidelines sentence for recalculation based on the one error the court found in the district court's application of the Guidelines.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1992

WILLIAM POLLEN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTORY STATEMENT

Petitioner files this Reply to theBrief in Opposition in order to correct certain fundamental errors contained in the Brief for the United States in Opposition ("Opposition Brief") and to highlight the fact, stated in the Opposition Brief, that this Court has never decided the important issue of the proper unit of prosecution under the federal tax evasion statute, 26 U.S.C. § 7201.

## REPLY TO BRIEF IN OPPOSITION

### I.

### THE OPPOSITION BRIEF CONFUSES THE ISSUE OF MULTIPLICITY WITH THE ISSUE OF DOUBLE JEOPARDY; ALTHOUGH THE FORMER WAS WAIVED BY DEFENDANT'S GUILTY PLEA, THE LATTER WAS NOT.

Respondent states that Petitioner "waived his multiplicity claim when he pleaded guilty to four of the offenses charged in the indictment" (Opposition Brief, at 7), implying that this waiver should bar Petitioner's double jeopardy claim on appeal. The Court of Appeals for the Third Circuit rejected this waiver argument in this case, *United States v. Pollen,* 978 F.2d 78, 84 (3d Cir. 1992), and considered the merits of Defendant's double jeopardy argument. The Government's waiver argument is wrong for the reasons stated by the Third Circuit in this case.

Failure to raise the issue of multiplicity of the indictment below does not constitute a waiver of Defendant's claim of illegal multiplicity of sentences. Courts of appeals which have considered this issue have rejected such claims by the Government. In *United States v. Mastrangelo,* 733 F.2d 793, 800 (11th Cir. 1984), the Eleventh Circuit stated that although a failure to raise below the issue of multiplicity of the indictment does bar a

defendant on appeal from asserting that he cannot be indicted or convicted twice for the same crime, nonetheless, "he may challenge the imposition of multiple sentences for the alleged commission of one crime." *See also, United States v. Bonavia*, 927 F.2d 565, 571 (11th Cir. 1991); *United States v. Davis*, 799 F.2d 1490, 1494 (11th Cir. 1986). Likewise, the Fifth Circuit has held that:

> The Government asserts that [the defendant] has waived any opportunity to complain about multiplicity .... We note however, that [defendant's] complaint on appeal goes to the multiplicity of sentences imposed and does not directly challenge the multiplicity in the indictment. This distinction has been recognized by the courts. Multiplicity of an indictment must be raised as a defense pursuant to Fed. R. Crim. P. 12(b) to be preserved for appeal. A complaint about multiplicity of sentences however can be raised for the first time on appeal.

*United States v. Stovall*, 825 F.2d 817, 821 (5th Cir. 1987) (citations omitted); *see also, United States v. Osunegbu*, 822 F.2d 472, 481 n. 26 (5th Cir. 1987).

Similarly, the Sixth Circuit has stated that:

> The argument that one waives his right to object to the imposition of multiple sentences by his failure to object to the multiplicious nature of an indictment is a *non sequitur*. Rule 12 applies only to objections with regard to error in the indictment itself; the effect of Rule 12 is that dismissal of a multiplicitous

> indictment is not required [if not raised below]; however, if sentences are imposed on each count of that multiplicitous indictment the defendant is not forced to serve the erroneous sentence because of any waiver.

*United States v. Rosenbarger*, 536 F.2d 715, 721-22 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *see also, United States v. Blocker*, 802 F.2d 1102, 1103 (9th Cir. 1986) (same holding, where defendant entered a guilty plea and appealed his sentence); *United States v. Bough*, 787 F.2d 1131, 1132 (7th Cir. 1986) (guilty plea does not waive double jeopardy challenge to indictment judged deficient on its face); *United States v. Marino*, 682 F.2d 449, 454 n. 3 (3d Cir. 1982).

*United States v. Broce*, 488 U.S. 563 (1989), relied on by the Government (Opposition Brief, at 7), does not overrule the holdings of these cases when the defect in the indictment is apparent on its face, as it is here. *Broce* held that "a plea of guilty to a charge does not waive a claim that — *judged on its face* — the charge is one which the [Government] may not constitutionally prosecute." 488 U.S. at 575 (emphasis in original), *quoting Menna v. New York*, 423 U.S. 61, 63 n. 2 (1975). Thus, *Broce* emphasized that where the existing record may be relied on to determine legality of punishment, a challenge to the punishment will not be waived by entry of a guilty plea. The deficiency in the instant indictment is apparent on its face, and hence this appellate challenge is not precluded by *Broce*.[1]

1. The "plain error" doctrine would also require review of Petitioner's sentence here. *E.g., United States v. Podell*, 869 F.2d 328, 332 (7th Cir. 1989). In *Podell*, the Seventh Circuit found plain error in a situation such as that here, stating that: "Convictions and sentences that expose a defendant to double jeopardy are illegal, and result in miscarriages of justice. Therefore, we hold that the district court committed plain error in allowing the defendant to be convicted on [2 counts] of the indictment. . . ."

## II.

## THE PETITION FOR CERTIORARI IS SUPPORTED BY RESPONDENT'S ACKNOWLEDGMENT THAT NO CASE HAS DECIDED THE PRECISE QUESTION PRESENTED HERE, THAT OF THE APPROPRIATE UNIT OF PROSECUTION UNDER 26 U.S.C. § 7201.

Respondent argues that the decision in this case does not conflict with that of any other court of appeals because no other court of appeals has decided the precise question presented here (Opposition Brief, at 9). Even if true (*but see* discussion in Petition, at 7-8), this statement highlights the fact that the issue presented herein is an important one, yet undecided, which should be decided by this Court.

## III.

## THE PROPER UNIT OF PROSECUTION IS GOVERNED BY CONGRESSIONAL INTENT; WHETHER EACH ADDITIONAL ATTEMPT INCREASES THE LIKELIHOOD OF SUCCESSFUL TAX EVASION IS IRRELEVANT.

Respondent agrees that it is congressional intent which establishes the appropriate unit of prosecution under a criminal statute (Opposition Brief, at 7). However, the Opposition Brief makes the inconsistent argument that: "Each time a taxpayer engages in an act of evasion, he increases the likelihood of his success, increases the amount of tax that may ultimately be evaded . . . and increases the potential cost of IRS's enforcement efforts," suggesting that this fact somehow supports the position that the proper unit of prosecution under 26 U.S.C. § 7201 is each separate attempt to evade a tax.

If this were true, then the unit of prosecution for any crime would be each attempt to commit it or each act to further it. For most federal crimes, this is not so. For example, this Court has found that it was the course of conduct which Congress meant to criminalize under the Fair Labor Standards Act ("FLSA") and not each act of failing to pay the minimum wage. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). FLSA treats as one offense all acts that "arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse.' " 344 U.S. at 224. A similar analysis applies here, where all actions taken by Petitioner were taken with the single intent to avoid payment of the specific tax(es) in question.

Similarly, 31 U.S.C. § 5324(3) makes it a crime to structure a transaction to avoid currency reporting requirements. Despite the Government's argument that each act in furtherance of the "structure" (*i.e.*, each deposit of under $10,000) may be charged as a separate violation (the same argument made here), both the Seventh and the Tenth Circuits have recently rejected this position and held that the *structured transaction* and not its components is the proper unit of prosecution. *United States v. Dashney*, 937 F.2d 532, 541-42 (10th Cir.), *cert. denied*, 112 S. Ct. 402 (1991); *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).

Likewise, each subsequent overt act does not constitute a separate conspiracy or crime if each such act advances only one scheme or agreement. *See, e.g., United States v. McCarty*, 611 F.2d 220, 223 (8th Cir. 1979). Similarly, in a bank fraud case brought under 18 U.S.C. § 1334, it is the scheme which is punishable, not each act in furtherance of it. *E.g., United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992) (indictment was multiplicitous, which charged two fraudulent acts as separate crimes).

Thus, the Government's argument that additional attempts

create greater harm begs the question and is a position which has been rejected in other "unit of prosecution" cases. It is also wrong. The true harm visited on the public by tax evasion, is the defendant's failure to pay the tax—not each attempt to avoid payment of the one sum of money.[2]

## IV.

## THE UNIT OF PROSECUTION WILL CONTINUE TO HAVE AN IMPACT ON SENTENCES FOR OFFENSES OCCURRING AFTER NOVEMBER 1, 1987, THE EFFECTIVE DATE OF THE SENTENCING GUIDELINES.

Respondent states that: "[F]or offenses occurring after November 1, 1987, the effective date of the Sentencing Guidelines, the resolution of the unit of prosecution issue in the case will not have any impact on the length of a defendant's sentence" (Opposition Brief, at 11). Respondent attempts to explain this faulty conclusion by stating that under the Guidelines, all counts involving substantially the same harm are grouped for sentencing purposes, and the total tax loss, not the number of violations, governs the sentence (Opposition Brief, at 10-11).

However, the maximum sentence for conviction on one count charging a violation of 26 U.S.C. § 7201 is five years. Therefore, in cases where the Guidelines score would permit or require imposition of a sentence of more than five years (or 60 months), it

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2. If one defendant engaged in seven transactions to secrete $100,000 that would otherwise be used to pay a tax due, and another defendant engaged in two transactions to accomplish the same end, the harm to the public—the loss of $100,000 in tax income—is exactly the same. Both these defendants should face the same single charge and be sentenced identically.

would make a difference whether a defendant were convicted of one or more section 7201 violations.[3]

In addition, the number of counts of conviction determines the amount of the special assessment which must be imposed on a defendant, pursuant to 18 U.S.C. § 3013(a). *See Ray v. United States*, 481 U.S. 736, 737 (1987); *United States v. Barel*, 939 F.2d 26, 36 (3d Cir. 1991) (special assessment imposed on each count of conviction precludes application of concurrent sentence doctrine). Thus, a defendant's sentence will continue to be influenced by the number of charges which the Government can bring against him under 26 U.S.C. § 7201, a number dictated by the unit of prosecution intended by Congress.

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3. The original Guidelines calculation in the instant case provides a good example of a Guidelines range of more than 60 months in a tax evasion case. Defendant's Guidelines score was originally calculated to be 23; his criminal offense category was 3. His resulting Guideline range of 57-71 months (App. 39a; 56a) would have allowed imposition of a Guidelines sentence of more than five years only if more than one Guidelines count had been charged. However, because Defendant was convicted on one Guidelines count, his Guidelines sentence was limited to one within the statutory five-year maximum. Only if a defendant were convicted of more than one Guidelines count and his Guidelines score were more than 60 months, could the court impose consecutive Guidelines sentences, resulting in a sentence of more than five years.

## CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, it is respectfully submitted that a Writ of Certiorari should be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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